TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1043.

FREDERICK HOPT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE TERRITORY OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 6, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1043.

FREDERICK HOPT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE TERRITORY OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

INDEX.

	Original	Print.
Indictment	1	1
Arraignment	4	2
Impaneling of jury	5	2
Minutes of trial	11	4
Verdict	14	5
Charge to jury	15	5
Instructions asked by defendant and given by the court	36	11
Instructions asked by defendant	45	15
Time for passing sentence fixed	50	16
Motion for new trial	51	17
Stipulation as to bill of exceptions	54	18
Order on stipulation	55	18
Motion for new trial submitted	56	19
Motion for new trial denied	57	19
Sentence	58	19
Notice of appeal	60	20
Bill of exceptions	62	20
Testimony	62	20
Instructions asked by defendant	68	23
Charge to jury	76	26
Motion for new trial	94	32
Statement as to the trial	96	32
Motion to indorse instructions	100	34
Assignment of errors	101	34
Clerk's certificate	104	35
PROCEEDINGS IN SUPREME COURT, UTAH TERRITORY.		
Hearing	106	35
Judgment	107	36
Writ of error	108	36
Citation	110	37
Affidavit of pauperism	111	37
Assignment of errors	113	38
Clerk's certificate	117	39

1 TERRITORY OF UTAH:

In the third judicial district court.

THE PEOPLE OF THE TERRITORY OF UTAH } Murder in the first degree.
vs.
FRED WELCOME AND JACK EMERSON. }

Fred Welcome and Jack Emerson are accused by the grand jury of this court by this indictment of the crime of murder in the first degree, committed as follows: The said Fred Welcome and Jack Emerson, on the 3rd day of July, 1880, at the county of Summit, in said Territory, with force and arms and with some deadly instruments and weapons to the grand jury unknown, feloneously, wilfully, deliberately, and of their malice aforethought and premeditatedly, did make an assault in and upon one John F. Turner, and with said deadly instruments and weapons did then and there feloneously, wilfully, deliberately, premeditatedly, and of their malice aforethought, mortally wound said John F. Turner in and upon the side of his head
2 and face, of which said wound the said John F. Turner did then and there die, and the grand jury aforesaid *to* say and charge that the said Fred Welcome and Jack Emerson, in the manner and form aforesaid, feloneously, wilfully, deliberately, maliciously, premeditatedly, and of their malice aforethought, did kill and murder, contrary to the form of the statutes of said Territory in such case made and provided, and against the peace and dignity of the people aforesaid.

JOHN CUNNINGTON,
Foreman of the Grand Jury.

JAS. H. BEATTY,
Ass't U. S. Att'y, &c.

No. 4635. (Endorsed:) In the 3d dist. court of Utah. The People, &c., vs. Fred Welcome and Jack Emerson. Murder. A true bill. John Cunnington, foreman. Witnesses, Chas. E. Batts, Thomas J. Stelfox, Thomas Fowler, John N. Turner, Daniel Moore, J. F. Benedict, E. M. Allison, A. J. Moore. Presented in open court by the foreman of the grand jury in its presence, and by me filed this 14th day of December, 1880. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

3 Dec. 14th, 1880.—Issued warrant.

Dec. 17th, 1880.—Def'ts arraigned and say they do not desire court to appoint counsel; def't Fred Welcome says his true name is Frederick Hopt; and def't Jack Emerson says his true name is John McConnell, and each plead not guilty.

1883, March 2, 3, 5, 6, & 7.—Empanelling of jury for trial of def't Hopt. Jury sworn March 7th, 1883.

March 9, 1883.—Filed verdict of guilty.

March 22, 1883.—Filed motion for new trial.

April 2, 1883.—Motion for new trial overruled.

April 2, 1883.—Def't sentenced to be hanged June 1, 1883.

April 6th, 1883.—Filed notice of appeal.

4 Third district court of Utah.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FRED WELCOME AND JACK EMERSON. } Indictment for murder in the first degree.

On this day the defendants are arraigned at the bar in open court in due form of law. Def't Fred Welcome says his true name is Frederick Hopt; def't Jack Emerson says his true name is John McConnell; and they each say that they do not desire the court to appoint counsel for himself at the present time, and each defendant demands a separate trial and each defendant pleads to said indictment not guilty.

Dec. 17th, 1880.

JOHN A. HUNTER, *Judge.*

5 In the third district court of Utah Terr'y.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED IN THE NAME OF Fred Welcome and impleaded with another. } Murder in the first degree. March 2nd, 1883.

On this day the said cause came on regularly for trial of the defendant Frederick Hopt, indicted in the name of Fred Welcome, on separate trial, and said defendant is in open court & present with his counsel Lee J. Sharp and J. A. Marshall, and P. T. Van Zile, U. S. dist. attorney, E. T. Sprague, ass't U. S. attorney, and Arthur Brown, esq., counsel for the prosecution, are present, and all parties announce themselves ready for trial, and the empanelling of a jury of twelve persons to try said case against said defendant Hopt is proceeded with on their voir dire.

George Peterson and Herman Bamburger are excused on peremptory challenge of prosecution. John L. Crane and Hiram Groesbeck
6 excused on peremptory challenge of defendant. Samuel F. Lee challenged by def't for actual bias; denied. Court appoints J. H. Beatty, E. D. Hoge, and W. J. Snyder as triers, who are sworn and charged, and triers took juror out of court-room and out of presence of def't, and returning report challenge not true, and in the absence of the court and def't heard and determined said challenge; no testimony produced or offered before them except that of the juror; excused on peremptory challenge of def't.

1. Charles Strausburg accepted and sworn to try the case. John Smith, challenged by def't for actual bias; denied. The court appoints J. H. Beatty, S. K. Lewis, and W. L. Snyder as triers, who are sworn and charged, and triers took juror out of the court-room and out of presence of def't, and returning report challenge not true, and in the absence of the court and def't heard and determined said challenge; no testimony produced or offered before them except that of the juror, & juror excused on peremptory challenge of def't.

2. J. S. Wheeler accepted and sworn to try the case.

7 George F. Adkins excused on peremptory challenge of def't.

3. A. W. Tuttle accepted and sworn to try the case, and certain other proceedings were had.

Simon Hibbard challenged by def't peremptorily, excused.

George Canlam challenged for bias; denied; overruled; challenged by def't for actual bias; denied. The court appoints Snyder, Kaign, and Jonasson triers, who are sworn and charged; and triers took juror out of court-room and out of presence of def't, and, returning, report challenge not true, and, in the absence of the court and def't, heard and determined said challenge. No testimony produced or offered before them except that of the juror. Excused on def't's peremptory challenge.

Thomas E. Harper challenged by def't for bias; denied; overruled; excused on defendant's peremptory challenge.

Reuben Chesire challenged by def'ts for bias; denied; overruled; challenged for actual bias. Court appoints Jonasson, Snyder, and
8 Blandin as triers, who are sworn and charged, and triers took juror out of court-room and out of presence of def't, and, returning, report challenge not true, and, in the absence of the court and def't, heard and determined said challenge. No testimony produced or offered before them except that of the juror. Excused on peremptory challenge of def't.

4. Thomas S. Snarr challenged by def't for bias; denied; overruled; exception. Challenged by def't for actual bias. Court appoints Janasson, Snyder, and Blandin as triers, who are sworn and charged, and trier took juror out of court-room and out of presence of def't, and, returning, report challenge not true, and, in the absence of the court and def't, heard and determined said challenge. No testimony produced or offered before them except that of the juror, and the juror is accepted and sworn to try the case.

5. Leonard Cottrell accepted and sworn to try the case.

6. E. L. Butterfield accepted and sworn to try the case.

George G. Hardy challenged for cause by def't; denied; challenged for bias; denied; overruled; exception; challenged by def't peremptorily; excused.

9 7. E. W. Ruff accepted and sworn in the case.

Charles Ringwood challenged by def't peremptorily; excused.

8. John Gilchrist accepted and sworn in the case.

Samuel D. Wallace challenged by def't peremptorily; excused.

Daniel O. Rideout "jr.," challenged by de'f peremptorily; excused.

Morris Palmer challenged by def't peremptorily; excused.

9. Andrew Kilpoyle accepted and sworn in the case.

Edwin Dowden challenged by def't peremptorily; excused.

10. H. E. Wylie accepted and sworn in the case.

F. H. Zelden challenged by prosecution for bias as having formed an unqualified opinion; denied by def't; juror excused; def't excepts.

11. James C. Hamilton challenged by def't for bias; denied; challenged for actual bias. The court appoints Barnum, Williams, and Jonasson as triers, who are sworn and charged, and triers took juror out of court-room and out of presence of def't, and, returning, report challenge not true, and in the absence of court and def't heard and determined said
10 challenge. No testimony produced or offered before them except that of the juror, and the juror is sworn in the case.

Orson D. Romney accepted and sworn in the case.

And the prosecution ask that the jury be sworn in a body to try the case, and the following are the jurors empanelled and sworn to try the case, namely: Charles Stromberg, J. S. Wheeler, N. W. Tuttle, Thomas S. Snarr, Leonard Cottrell, E. L. Butterfield, E. W. Ruff, John Gilchrist, Andrew Kilpoyle, H. E. Wylie, James C. Hamilton, Orson D. Romney.

The indictment is read and plea of defendant stated to the jury by the clerk. Defendant files affidavit and asks that all witnesses be excluded from the court-room during the trial until after they have testified, which is so ordered by the court. Leonard Philips, Thomas Fowler, John Turner, and Silas Allred are sworn and testify for the prosecution, and the further hearing herein is adjourned until to-morrow at ten o'clock a. m., with the statutory admonition to the jury by the court.

March 7, 1883.

11 THE PEOPLE OF THE TERRITORY OF Utah *vs.* FREDERICK HOPT, INDICTED IN THE NAME OF Fred Welcome and impleaded with another. } Murder in the first degree.

On this day the defendant, Frederick Hopt, is present in open court with his counsel, and the prosecution by Arthur Brown, esq., and E. T. Sprague, ass't U. S. attorney. The jurors are called and all answer and are present, and the trial of said defendant is resumed. Dr. J. M. Benedict, John Baird, T. J. Carr are sworn and testify for the prosecution. John Turner recalled and further testified, and the prosecution not desiring the witness to further testify he is allowed to remain in the court-room, to which def't excepts. John Jaques, G. W. Akoff, Alfred Simon, J. L. Osborn, Cyrus Bates, Cyrus B. Hawley, Alma Clyde, Wm. Sutton, Wm. Reynolds, David Moore, W. H. Morse, G. B. Campbell, T. J. Carr (recalled), and E. M. Allison are sworn and testify for the prosecution, and the hearing herein is adjourned until to-morrow at 10 a. m., to which time jury is excused under admonition of the court.

March 8, 1883.

JOHN A. HUNTER, *Judge*.

12 THE PEOPLE OF THE TERRITORY OF Utah *vs.* FREDERICK HOPT, INDICTED IN THE NAME OF Fred Welcome and impleaded with another. } Murder in the first degree.

On this day the defendant, Frederick Hopt, with his counsel, L. J. Sharp and J. A. Marshall, are present in open court, as also the prosecution by Arthur Brown, esq., and E. T. Sprague, ass't U. S. att'y. The jurors are called, all present, and the trial is resumed. A. J. Moore, Milt Thomas, N. Rugg, Ellis Reese, John McCormick (alias Jack Emerson) are sworn and testify for the prosecution. It is conceded that the witness John McCormick is a convict, serving a life sentence in Utah penitentiary. Def't objects to his testifying. Overruled; exception; and the prosecution rested their case. Ed. Brain sworn and testifies for def't from his notes taken at former trial, by reading said notes, he having reported said testimony of a witness for

the prosecution at said trial, Charles Jones, whose presence cannot now be obtained. Myers Sickel sworn and testified for defendant, and de-
13 fendant rested his case. Evidence closed, and final argument to the jury is waived by counsel, and the court instructed the jury and they retire to consider of their verdict, and subsequently the jury return into court, and being called all answer to their names and declare their verdict, which is recorded by the court and is in the words and figures following, to wit:

In the third judicial district court of Utah Territory, Salt Lake County.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED IN THE NAME OF Fred Welcome and impleaded with another.	Indicted for murder in the first degree.

We, the jury empanelled in the above case, find the defendant Frederick Hopt guilty of the crime of murder in the first degree.
March 9th, 1883.

J. S. WHEELER, *Foreman.*

Whereupon counsel for defendant asked on the part of defendant to be allowed until April 1st, 1883, to prepare, serve, file, and settle a bill of exceptions for def't in said case and to serve and file notice and motion of defendant for new trial, which is allowed by the court.
March 9th, 1883.

14 In the third judicial district court of Utah Territory, Salt Lake County.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED IN THE NAME OF Fred Welcome and impleaded with another.	Indicted for murder in the first degree.

We, the jurors empanelled in the above case, find the defendant Frederick Hopt guilty of the crime of murder in the first degree.
March 9th, 1883.

J. S. WHEELER, *Foreman.*

(Endorsed:) The People, &c., vs. Fred'k Hopt. Verdict Filed March 9th, 1883. O. S. Averell, clerk. By H. G. McMillan, deputy clerk.

15 THE PEOPLE OF THE TERRITORY OF Utah *vs.* FRED WELCOME AND JACK EMERSON.

The defendant, Frederick Welcome alias Fred Hopt, impleaded with Jack Emerson, stands indicted by the grand jury of this the third judicial district of the Territory of Utah of the crime of murder in the first degree, alleged to have been committed on or about the 3rd day of July, A. D. 1880, at the county of Summit, in said Territory, in and upon one

John F. Turner. He is now on trial before you charged with the said offense, and you are called upon to declare whether the prosecution has made out its case; whether the defendant is guilty or innocent.

Murder, as defined by the statutes of this Territory (sections 1917, 1918, and 1919, compiled laws, pages 585 & 586), is the unlawful killing of a human being, with malice aforethought. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.

16 It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned or malignant heart.

Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing, or committed in the perpetration of or attempt to perpetrate any arson, rape, burglary, or robbery, or perpetrated from a premeditated design, unlawfully and maliciously, to effect the death of any other human being other than him who is killed, or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind regardless of human life is murder in the first degree. Any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree.

Section 168 of criminal procedure, acts of 1878, page 95 of Utah Territory, provides that the distinction between an accessory before the

17 fact and a principal, and between principals in the first and second degree in cases of felony, is abrogated, and all persons concerned in the commission of a felony, whether they distinctly commit the act constituting the offense or aid or abet in its commission, though not present, shall hereafter be indicted, tried, and punished as principals. This was the law of this Territory at the date of the alleged offense charged in the indictment against the defendant now on trial, and since then at all times has been and is now the law of this Territory.

All persons concerned in the commission of a felony before the fact are principals, and are to be indicted, tried, and punished as such. If you should find that the defendant was concerned in the commission of the act of killing the deceased John F. Turner before the infliction of the act resulting in the death he is a principal, and is to be indicted, tried, and punished as such. In dividing murder into two degrees the

18 legislature intended to assign to the first as deserving of greater punishment all murders of a cruel and aggravated character, and to the second all other kinds of murder which are murder at common law, and to establish a test by which the degree of every case of murder may be readily ascertained. That test may be thus stated: Is the killing wilful, that is to say intentional, deliberate, and premeditated. If it is, the case falls within the first, and if not within the second degree.

There are certain kinds of murder which carry with them conclusive evidence of premeditation. These the legislature has enumerated in the statute, and has taken upon itself the responsibility of saying that they shall be deemed and held to be murder of the first degree. First, where the killing is perpetrated by poison or lying in wait; here the means used is held to be conclusive evidence of premeditation. The second is when the killing is done in the perpetration of or attempt to perpetrate any of

the felonies enumerated, viz, arson, rape, burglary, or robbery, or from a premeditated design unlawfully and maliciously to effect the death
19 of any other human being other than him who is killed, or by any act greatly dangerous to the lives of others and evidencing a depraved mind regardless of human life. Here the occasion is made conclusive evidence of premeditation.

When the case comes within either of these classes the test question, "Is the killing wilful, deliberate, malicious, and premeditated," is answered by the statute itself, and the jury have no option but to find the prisoner guilty in the first degree. Hence so far as these two cases are concerned all difficulty as to question of degree is removed by the statute. But there is another and much larger class of cases included in the definition of murder in the first degree, which are of equal cruelty and aggravation with these enumerated, and which owing to the different and countless forms which murder assumes it is impossible to describe in the statute. In this class the legislature leaves the jury to determine, from all the evidence before them, the degree of the crime, but prescribes for the government of their deliberations the same test which has been used by itself in
20 determining the degree of the other two classes, to wit, the deliberate and preconceived intent to kill. It is only in the latter class of cases that any difficulty is experienced in drawing the distinction between murder of the first and murder of the second degree, and this difficulty is more apparent than real.

The unlawful killing must be accompanied with a *a* deliberate, clear intent, with malice aforethought, to take life in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection, and not upon a sudden heat of passion, sufficient to produce the idea of deliberation. There need be no appreciable space of time between the intention to kill the act of killing. They may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by concurrence of will, deliberation, and premeditation on the part of the slayer, and if such is the case the killing is murder in the first de-
21 gree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.

It follows therefore from what I have thus charged you that to constitute murder in the first degree the killing must have been unlawful and with malice aforethought, and must have been wilful, deliberate, and premeditated. Our statutes further provide that to make the crime murder the party must have died within a year and a day after the stroke received, or the cause of death administered, in the computation of which the whole of the day on which the act was done shall be reckoned the first.

The term malice is used in a technical sense, and includes in its definition not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain
22 indications of a heart regardless of social duty and fatally bent on

mischief, and therefore malice is implied from any deliberate or cruel act against another, however sudden.

The terms deliberation and premeditation contemplate and mean that the party committing the act must have deliberated & premeditated upon doing the act before its commission. As before said, in deliberation there need be no appreciable space of time between the intention to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceeded by a concurrence of will, deliberation, and premeditation on the part of the slayer, and if such is the case the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing, if the death occurred within a year and a day, reckoned as before stated. In saying that no particular length of time is necessary for deliberation or premeditation in murder in the first degree, I wish you to understand that actual
23 deliberation and premeditation of the intended murder is necessary, and that, too, while the accused is calm and cool enough to reflect upon the act he is about to do, but the length of time of such deliberation is immaterial.

Under the statutes of this Territory (Laws of Utah, 1878, subdivision 7 of section 257, page 115) you are instructed that you are the sole judges of the credibility of the witnesses and of the weight of the evidence and of the facts; and you are also further instructed that the defendant is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to an acquittal.

A reasonable doubt is such an one as would arise in the minds of reasonable men on any subjects; just such men as you are, who are selected because you are reasonable, competent men to try such a question. Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed
24 to exist; that the fact to be proven actually exists; such proof as produces an abiding conviction in the mind of moral certainty that the fact exists, so that you feel certain that it exists. A balance of proof is not sufficient. A balance of evidence is that which you think is most likely to have been the fact; the way your mind preponderates upon a question of fact. That makes out a balance, but that will not answer here; you must go beyond that.

There must not only be a balance of proof, but there must be this full measure of proof which removes all reasonable doubt—all doubt that arises in your minds as reasonable—and produces an abiding conviction, to a moral certainty, that the facts charged exist. Proof beyond the possibility of a doubt is not required, because such proof can never be made. It is not to be shown to you that it is not possible that this respondent is innocent to show beyond all possibility of doubt that he is guilty. But it is required of the prosecution to produce such evidence that when
25 you look it over as reasonable men no doubt arises in your minds— that , no reasonable, fair doubt—as to any fact necessary to make out the crime charged upon the respondent. You will recollect that in rendering your verdict you do not, as is sometimes stated, swear that the defendant is either guilty or not guilty.

The jury swear no such thing. They declare, in rendering the verdict, the result of their minds from the evidence produced, being sworn to return a true verdict according to the evidence.

The prosecution in this case has introduced a vast amount of circumstantial evidence. Evidence is ordinarily divided into two kinds, viz, direct and circumstantial: direct when the witness testifies to the principal fact in issue, as when a murder is committed the witness testifies that he saw the blow inflicted which resulted in death and the person by whom it was inflicted. In such case the truth of the witness testifying is the main subject of inquiry. In circumstantial testimony there is the fact
26 proving and the fact proved inferentially from the fact given in testimony. The circumstances must be proved to the satisfaction of the jury, and it is for them to say when that is done, and then to draw the inference from the fact or circumstance thus proved.

Each kind of evidence is entirely legal and competent and will sustain a conviction if it produces in the minds of the jury a belief beyond a reasonable doubt of the guilt of the accused; but each and every of the circumstances should be consistent only with the theory of guilt. All evidence is more or less circumstantial, the difference being in degree. It is of a nature identical with direct evidence, the distinction being that by direct evidence is intended evidence which applies directly to the fact which forms the subject of inquiry. Circumstantial evidence is equally direct in its nature, but, as its name imports, it is direct evidence of a minor fact or facts incidental to or usually connected with some other fact as its incident, and from which such other fact is inferred. In order to convict all the circumstances taken together must be sufficient to exclude
27 all disbelief; for you who pass upon the question are not at liberty to disbelieve as jurors, while as the result of the evidence in the case you believe as men; it is enough to convict that your consciences are clear and your judgment satisfied beyond a reasonable doubt.

The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment; and when it appears to the jury, from the evidence adduced on the trial, that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only. In this case murder in the second degree is an offense included in that with which the defendant is charged in the indictment.

Drunkenness is not an excuse for crime; but as in all cases where a jury find a defendant guilty of murder they have to determine the degree of crime, it becomes necessary for them to inquire as to the state of mind
28 under which he acted; and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered, where the homicide is not committed by means of poison or lying in wait or in the perpetration of or attempt to perpetrate any arson, rape, burglary, or robbery, or perpetrated from a premeditated design, unlawfully and maliciously, to effect the death of any other human being other than him who is killed, or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind regardless of human life.

The degree of the offense depends entirely upon the question whether the killing was wilful, deliberate, and premeditated and with malice afore-

thought, and upon that question it is proper for the jury to consider evidence of intoxication, if any there be; not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after in order to justly determine the question as to whether his mind was capable
29 of that deliberation or premeditation or malice aforethought which according as they are absent or present determine the degree of the crime.

30 Section 273 of the criminal procedure act of this Territory (Laws 1878, page 118) provides that "a conviction cannot be had on the testimony of an accomplice unless he is corroborated by the evidence which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

You are instructed that, unless the testimony of the accomplice is corroborated by other evidence which in itself tends to connect the defendant with the commission of the offense charged, you cannot, under this statute last above referred to and quoted, convict the defendant on the testimony of Jack Emerson alone. If, however, there is other evidence tending in itself to convict the defendant with the commission of the offense charged you can consider the testimony of Emerson in arriving at your verdict. The corroborative testimony will not admit of your considering it
31 with the testimony of Emerson if it only goes to show what relation to the fact that an offense has been committed or the circumstances of it. It must be of that nature which in itself tends to connect and does connect the defendant with the commission of the offense. It need not, of course, be sufficient to establish the guilt of defendant, for in that event the testimony of Emerson, the accomplice, would not be needed. But it must tend in some slight degree at least to implicate the defendant. The purpose of the statute was to prohibit a conviction unless there was some evidence entirely exclusive of that of Emerson, which of itself, and without the aid of Emerson's testimony, tended to raise at least a suspicion of the guilt of the defendant.

32 The burden of proof is upon the prosecution in this case. It does not shift in criminal cases, but is upon the prosecution throughout to establish defendant's guilt beyond a reasonable doubt. You are not to find that the defendant is properly suspected, or that he is probably guilty, or that there is a preponderance of evidence against him, but before you bring in a verdict of guilty you must find, as a matter of fact beyond a reasonable doubt, that the defendant committed the offense. The law clothes the defendant with the presumption of innocence, which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt—which means that the evidence of his guilt must be clear, positive, and abiding, fully satisfying the minds and consciences of the jury. It is not sufficient in a criminal case to justify a verdict of guilty that there may be a strong probability of guilt, nor a preponderance of evidence against defendant, but what the law requires is proof by legal and credible evidence of such a nature that when
3 it is all considered by the jury, giving to it its natural effect, they

feel when they have considered it all a clear, undoubting, and entirely satisfactory conviction of defendant's guilt. They must be entirely satisfied of the guilt of the accused. If the defendant's guilt be thus proven the jury should find him guilty; if not, they should acquit.

If you find the defendant guilty you will be careful to say in your verdict the degree of the crime of which you find him guilty. If you find the defendant not guilty you will so say in your verdict.

34 Gentlemen, I have, in as concise a manner as it is possible for me to ~~,~~ state' to you what is the law of this case, and by which you are to be governed in your deliberation. You will apply the facts & circumstances of this case to the law, and render your verdict accordingly. That an atrocious and dastardly murder has been committed by some person is apparent, but in your deliberations you should be careful not to be influenced by any feeling. Consider the case as jurors sworn to do your solemn legal duty, regardless of surroundings, and render your verdict in strict accordance with the law as it has been given to you and with the evidence as it has been detailed. While it is your duty to see that the law of the country is vindicated, and that the defendant, if he be the guilty party, receives the just reward of his conduct, you are also bound to see that he is not convicted if there is reasonable doubt of his guilt. Go to your retirement, gentlemen, with a full appreciation of the duty imposed upon you, and render your verdict as cool and dispassionate men,

35 uninfluenced by any other feeling than that of doing exact and positive justice to the law and the accused.

(Indorsed:) People vs. F. Hopt, &c. Instructions given by the court on its own motion. Filed M'ch 9, 1883. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

36 DEF'T'S REQUEST II.

If the jury find from the evidence that defendant inflicted the blow that caused the death of deceased, yet unless they are satisfied beyond a reasonable doubt that the blow was given deliberately and premeditatedly they cannot find him guilty of murder in the first degree.

By the term deliberate is meant that the manner of the performance was determined upon after examination and reflection; that the consequences, chances, and means were weighed, carefully considered, and estimated. By the term premeditated is meant that the action was planned, contrived, or schemed beforehand.

(On the margin :) Given. Hunter, judge.

DEF'T'S REQUEST III.

The defendant in this action is presumed to be innocent until the contrary is proved, and in case of reasonable doubt whether his guilt is satisfactorily shown he is entitled to an acquittal. If you believe from the evidence that the defendant is guilty of the crime of murder charged in *in* the indictment, and there is reasonable ground of doubt whether he is guilty of murder in the first or the second degree,

37 he can only be convicted of murder in the second degree.

(On the margin :) Given. Hunter, judge.

DEF'T'S REQUEST IV.

Being satisfied beyond a reasonable doubt means that there must be in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge, derived from a comparison and consideration of the evidence. They must be entirely satisfied of the guilt of the accused.

(On the margin:) Given. Hunter, judge.

DEF'T'S REQUEST V.

The evidence of verbal confessions of guilt is to be received by the jury with great caution; for besides the danger of mistake from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear to make an untrue confession.

(On the margin:) Given. Hunter, judge.

38 DEF'T'S REQUEST VII.

If the jury believe from the evidence that defendant, prior to the death of deceased, uttered threats against him, to make those threats evidence of malice for any purpose, they would have to be uttered while the defendant was in a sane state of mind, and would have to be uttered maliciously, seriously, with the intent to execute them.

(On the margin:) Given. Hunter, judge.

DEF'T'S REQUEST VIII.

If the jury believe from the evidence that defendant, prior to the death of deceased, uttered threats against him, to give those threats any weight as evidence of malice the jury must find that they were uttered seriously and with intent to execute them.

(On the margin:) Given. Hunter, judge.

DEF'T'S REQUEST IX.

The indictment in this case, stripped of its technical verbiage, charges that the defendant, within the jurisdiction of this court, killed one John F. Turner, intending to kill him.

Included in the direct charge is an implied one, namely, that the
39 intention was of a man in a state of sanity. A state of sanity means the state in which a man knows the act he is committing to be unlawful and wrong, and has reason sufficient to apply such knowledge and to be controlled by it.

The defendant pleaded not guilty to the charge in the indictment, which plea puts in issue not only the commission of the act charged, but also the mental character of and the legal accountability for said act.

(On the margin:) Given. Hunter, judge.

DEF'T'S REQUEST X.

In order to constitute a crime a person committing the act charged as such must have intelligence and capacity enough to have a criminal intent and purpose, and if his reason and mental powers are either so deficient that he has no will, no conscience, nor controlling mental power, or if through the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

(On the margin:) Given. Hunter, judge.

40 DEF'T'S REQUEST XI.

If the jury believe from the evidence that the defendant committed the act charged in the indictment, and if the evidence as to the insanity of the defendant (if there be any) should leave it in doubt as to whether he was insane at the time of the commission of the alleged crime, still if it also leaves in doubt his sanity at that time he is entitled to an acquittal.

(On the margin:) Given. Hunter, judge.

DEF'T'S REQUEEST XII.

If the jury believe from the evidence that the defendant committed the act charged in the indictment, still if the jury cannot say beyond a reasonable doubt that the defendant was sane at the time of the commission of the alleged act, or cannot say whether at that time he was sane or insane, they are bound to acquit him.

(On the margin:) Given. Hunter, judge.

DEF'T'S REQUEST XIV.

You must bear in mind that the moral as well as the intellectual faculties may be so disordered by disease as to deprive the mind of the controlling and directing power, and thereby deprive the person so affected of ability to control his actions.

(On the margin:) Given. Hunter, judge.

41 DEF'T'S REQUEST XV.

In order to constitute a crime a man must have memory and intelligence to know that the act he is about to commit is wrong, to remember and under-stand that if he commits the act he will be subject to punishment, and reason and will to enable him to compare and choose between the supposed advantage and gratification to be obtained by the criminal act and the immunity from punishment which he will secure by abstaining from it.

If on the other hand he have not intelligence and capacity enough to have a criminal intent and purpose, and if his moral or intellectual powers are so deficient that he has not sufficient will, conscience, or controlling mental power, or if through the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not a responsible moral agent and is not punishable for criminal acts.

(On the margin:) Given. Hunter, judge.

42 DEF'T'S REQUEST XVI.

To convict a person of crime he must have sufficient memory and intelligence to know that the act he is about to commit is wrong, to remember and understand that if he commits the act he will be subject to punishment, and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act and the immunity from punishment which he will secure by abstaining from it.

(On the margin:) Given. Hunter, judge.

DEF'T'S REQUEST XVII.

The defense of insanity is made out if the defendant satisfies the jury by a preponderance of evidence that he was insane at the time of the commission of the act charged in the indictment.

It is not necessary that the jury should be satisfied beyond a reasonable doubt of the insanity of the defendant. It is sufficient if there is a preponderance of evidence that he is insane, and on that question the jury are to be controlled by such preponderance.

(On the margin:) Given. Hunter, judge.

43 DEF'T'S REQUEST XVIII.

It is not essential that the defendant should introduce any evidence tending to show insanity to warrant an acquittal on the ground of insanity, provided that the evidence introduced by the prosecution satisfies the jury by a preponderance of evidence that the defendant was insane at the time of the commission of the act charged.

(On the margin:) Given. Hunter, judge.

DEF'T'S REQUEST XX.

If the jury believe from the evidence that the defendant took no part in the killing of John F. Turner, and did not prior to the killing act in concert with the party or parties that did the killing, then, even though you find that defendant was present at said killing, and did nothing to prevent it, and afterwards aided and assisted in concealing said killing, it is your duty to find him not guilty under this indictment.

(On the margin:) Given. Hunter, judge.

DEF'T'S REQUEST XXI.

If the jury believe that defendant made the confessions testified to, then in considering those confessions the jury must take the whole
44 thereof as evidence, the statements made in his own favor as well as those made against him; and the statements made in his own favor are to be considered not merely as evidence that he made such assertions, but as admissible evidence of the matter thus alleged by him in his discharge.

(On the margin:) Given. Hunter, judge.

(Indorsed:) People, &c., vs. Fred Hopt. Instructions asked by def'ts

and given by the court. Filed M'ch 9th, 1883. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

45 DEF'T'S REQUEST I.

The defendant in this cause is indicted for murder in the first degree. Under this indictment the jury may find him guilty of murder in the first or second degree. Murder is the unlawful killing of a human being with malice aforethought, either express or implied, and this applies to both murder in the first and second degree; and if you find the defendant guilty of the murder alleged in the indictment, you must designate in your verdict whether it be murder in the first or second degree. The unlawful killing may be effected by any of the various means by which death may be occasioned. All murder which shall be effected by means of poison, or lying in wait, torture, or any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree, and all other kinds of *of* murder shall be deemed murder in the second degree. In order to constitute murder in the first degree the unlawful killing must be accompanied by a deliberate and clear intent to take life; the intent to kill must be the result of a deliberate premeditation and must be founded upon a pre-existing reflection.

(On the margin:) Given in the charge of the court. Hunter, judge.

46 DEF'T'S REQUEST VI.

The burden of proof is upon the prosecution in this case; it does not shift in criminal cases, but upon the prosecution throughout to establish defendant's guilt beyond a reasonable doubt. You are not to find that defendant is properly suspected, or that he is probably guilty, or that there is a preponderance of evidence against him; but before you bring in a verdict of guilty you must find as a matter of fact, beyond a reasonable doubt, that the defendant committed the offense. The law clothes the defendant with the presumption of innocence, which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt, which means that the evidence of his guilt must be clear, positive, and abiding, fully satisfying the minds and consciences of the jury.

It is not sufficient in criminal cases to justify a verdict of guilty that there may be strong suspicions or very strong probabilities of guilt, nor a preponderance of evidence against the defendant, but what the law requires is proof by legal and credible evidence of such a nature that when it is all considered by the jury, giving to it its natural effect, they feel, when they have considered it all, a clear, undoubting, and entirely satisfactory conviction of defendant's guilt. They must be entirely satisfied of the guilt of the accused. If the defendant's guilt be thus proved the jury should find him guilty; if not, they should acquit.

(On the margin:) Given by court in its own charge. Hunter, judge.

47 DEF'T'S REQUEST XIII.

If the jury believe from the evidence that the defendant committed the

act charged in the indictment, still if they find that from any cause the defendant's mind was impaired, and that at the time of the commission of said act he became or was mentally incapable of governing himself in reference to deceased, and at the time of his committing said act was, by reason of such cause, unconscious that he was committing a crime, then he is not guilty of any offense whatever.

(On the margin:) Refused. Hunter, judge.

DEF'T'S REQUEST XIX.

If the jury believe that the defendant aided and abetted in the commission of the act charged in the indictment, but was not personally present at the commission of said act, and that said act was committed by a sane human agent in pursuance of a plan previously concerted between defendant and himself, then it is your duty to find the defendant not guilty under this indictment.

(On the margin:) Refused. Hunter, judge.

48 DEF'T'S REQUEST XXII.

Drunkenness is not an excuse for crime; but, as in all cases where a jury find a defendant guilty of murder they have to determine the degree of the crime, it becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary. The degree of the offense depends entirely upon the question whether the killing was wilful, deliberate, and premeditated; and upon that question it is proper for the jury to consider evidence of intoxication, if such there be, not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which according as they are absent or present determine the degree of the crime.

(On the margin:) Given by the court in its own charge. Hunter, judge.

49 (Indorsed:) 3rd dist. court. The People, &c., vs. Frederick Hopt, &c. Instructions asked by def't. Filed March 9th, 1883. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

50 In the third district court of Utah Territory.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED IN THE NAME OF Fred Welcome and impleaded with another. } Murder in the first degree.

Defendant Frederick Hopt is now brought before the court, and his

counsel is present, and the court fixes the time for passing its sentence and judgment upon the conviction heretofore had herein against said defendant on Monday, April 2nd, 1883, at 10 o'clock a. m.

March 2nd, 1883.

JOHN A. HUNTER, *Judge.*

51 In the district court of the third judicial district of Utah Territory, county of Salt Lake.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED UNDER THE NAME of Fred Welcome and impleaded with another. } Motion for new trial.

The defendant Frederick Hopt respectfully moves the court to vacate and set aside the verdict heretofore rendered in the above-entitled cause on the 9th day of March, 1883, and to grant a new trial of said cause upon the following grounds, to wit:

1. That a part of said trial was had in the absence of said defendant, to wit, in every case where a juror was challenged by defendant for actual bias said juror was examined by the triers in the absence of defendant and said challenge was found not true.

2. That said court misdirected the jury in a matter of law, to wit, in giving the last instruction given by said court to said jury, and in instructing them therein, "That an atrocious and dastardly murder has been committed by some person is apparent."

52 And said court erred in the decision of questions of law arising during the course of the trial, to wit:

1st. In permitting witness J. M. Benedict to answer when asked by the prosecution who identified to him the body examined by him as the body of John F. Turner, and in overruling defendant's objection thereto, defendant's objection being that the question called for and would bring before the jury hearsay and unsworn evidence.

2nd. In permitting T. J. Carr to detail a confession made to him by defendant a few minutes after defendant's arrest, and in overruling defendant's objections thereto: first, that said confession was induced by hopes of reward or fear of punishment; second, that it had not affirmatively appeared that it was not so induced.

3rd. In permitting Jack Emerson to testify against defendant, and in overruling defendant's objection thereto, to wit: that said Emerson had been convicted and sentenced for an infamous offense; that judgment had been rendered against said Emerson upon a conviction for felony, and that he had not been pardoned, nor had such judgment been reversed on appeal.

LEE J. SHARP &
JOHN A. MARSHALL,
Att'ys for Def't.

53 THE PEOPLE OF THE TERRITORY OF Utah
vs.
FREDERICK HOPT, INDICTED UNDER THE NAME of Fred Welcome, impl'd, &c.

To the United States district attorney for Utah Territory:

You will please take notice that on the 28th day of March, 1883, at 10 o'clock a. m. of said day, or as soon thereafter as counsel can be heard, at the court-room of said court, in Salt Lake City, Utah Territory, the defendant in this cause will make the foregoing motion to said court and ask that the same be granted.

LEE J. SHARP AND
JOHN A. MARSHALL,
Att'ys for Def't.

(Endorsed:) In 3rd judicial district court of Utah. The People, &c., vs. Fred Hopt. Motion for new trial. Served on us by copy this 22nd day of March, 1883. E. T. Sprague, ass't U. S. dist. att'y. Filed March 22nd, 1883. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

54 In the district court of the third judicial district of Utah Territory.

THE PEOPLE, &C.,
vs.
FRED'K HOPT.

It is agreed between the parties hereto that the defendant may have until the 10th day of April, 1883, to have settled and signed by the judge and filed with the clerk of said court a bill containing the exceptions by the defendant at the trial, and a statement of the matters thereat occurring which are entitled to go into such bill.

March 26, 1883.

E. T. SPRAGUE,
Ass't U. S. Att'y.

(Endorsed:) People, &c., vs. Fred'k Hopt. Stipulation. Filed March 28th, 1883. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

55 In the third district court, Utah.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, IMPLEADED WITH ANOTHER, &c. — Murder 1st degree.

In accordance with stipulation filed, time is allowed until April 18th, 1883, to have settled and signed said defendant's bill of exceptions herein, but to work no change in the time for passing sentence upon def't heretofore set.

March 28, 1883.

JOHN A. HUNTER, *Judge.*

56 Third district court of Utah Territory.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, IMPLEADED WITH ANOTHER.

Motion of the defendant to have the court endorse each instruction given at the trial of said defendant, &c., and the court declines to so endorse and orders that the said motion be, and the same is hereby, overruled, and defendant duly excepted; and the motion of said defendant for a new trial is now by counsel submitted without argument, and the court takes the same under advisement.

March 29th, 1883.

JOHN A. HUNTER, *Judge.*

57 In the third district court of Utah Territory.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, IMPLEADED WITH ANOTHER, &c. } Murder 1st degree.

The above case having been heretofore submitted to the court upon the motion of defendant Frederick Hopt, &c., for a new trial in the case, and the court having fully considered the grounds of said motion, and being now advised thereupon, and it appearing to the court that the errors alleged do not appear, and that the verdict is supported by law and the evidence, and that said motion ought to be denied:

It is ordered that the defendant's said motion for new trial be, and the same is hereby, denied and refused; to which ruling and order said def't excepted.

April 2nd, 1883.

JOHN A. HUNTER, *Judge.*

(Endorsed:) Title of court & cause. Filed April 2nd, 1883. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

58 In the third district court of Utah Territory.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED IN THE NAME OF Fred Welcome and impleaded with another. } Murder in the first degree.

Frederick Hopt, alias Fred Welcome, stand up. Have you anything to say why the sentence of the court should not be pronounced against you? You were indicted by the grand jury of this district of the crime of murder in the first degree, and have been tried by a jury in the manner provided by law, and have been found guilty of that crime, and the defendant alleges he is innocent. The penalty affixed by the statute for the crime of which you have been convicted is death, and must be inflicted by hanging you by the neck until you are dead, or by shooting you, at your

discretion. Which mode of death do you elect shall be inflicted upon you? And the defendant elects by hanging.

It is the judgment of the court that you, Frederick Hopt, in-
59 dicted in the name of Fred Welcome, be taken from hence to some place of confinement, in this district, that you be there safely kept until Friday, the first day of June next; that between the hours of ten o'clock in the forenoon and two o'clock in the afternoon of the last-named day, in the yard of the jail, or in the place where you are confined, or in some other private place in this district, you be hanged by the neck until you are dead.

Dated April 2nd, 1883.

JOHN A. HUNTER, *Judge.*

60 In the district court of the third judicial district of Utah Territory, Salt Lake County.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED UNDER THE NAME of Fred Welcome, impleaded with another. } Notice of appeal.

To the clerk of said district court and to P. T. Van Zile, U. S. district attorney for Utah Territory:

Please take notice that the defendant in the above-entitled cause hereby appeals to the supreme court of Utah Territory from an order made and entered in said cause in said district court on the 2nd day of April, 1883, denying defendant's motion for a new trial therein, and also from the judgment therein made and entered in said court of the 2nd day of April, 1883, against said defendant in said cause, and from the whole of said judgment.

April 5th, 1883.

LEE J. SHARP and
JOHN A. MARSHALL,
Att'ys for Def't.

61 (Endorsed:) In the third judicial district of Utah Territory. The People, &c., vs. Fred'k Hopt, indicted, &c. Notice of appeal served on me by copy after being filed, this 6th day of April, 1883. E. T. Sprague, asst. U. S. att'y. Filed April 6th, 1883. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

62 In the district court of the third judicial district of Utah Territory, Salt Lake County.

THE PEOPLE OF THE TERRITORY OF UTAH *vs.* FREDERICK HOPT, INDICTED UNDER THE NAME of Fred Welcome, impleaded with another. } Indicted for murder in the first degree.

Bill of exceptions.

I. Be it remembered that said cause coming on regularly for trial at the February term of said court, and on the 2nd day of March, 1883, of said

term, the defendant being personally present and being also represented by counsel, and the United States district attorney for Utah Territory being also present and representing The People, the court ordered a jury to be called in said cause.

II. After the jury had been sworn to try said cause, and during the progress, of said trial, the prosecution called as a witness Dr. J. M. Benedict, and interrogated Dr. Benedict as to a post-mortem examination made by him of the body of a corpse and as to the extent of the injuries which caused the death of the deceased as appeared from said examination. The witness stated that he did not know John F. Turner (with the mur-
63 der of whom the indictment in this cause charges the defendant), and did not recognize the corpse examined by him as the body of said Turner. He was then asked by the prosecution who pointed out and identified the body to him as the body of John F. Turner. The defendant by his counsel objected to the witness answering that question, and stated to the court as the ground of his objection that said question called for the statement of a third person; it is indirectly calling for the statement that somebody else identified that body. The court overruled defendant's said objection, and defendant by his counsel then and there duly excepted to such ruling of the court. The witness being permitted by the court to answer said question, replied, "I won't be certain if it was John W. Turner or Thomas Fowler, but think it was Fowler who identified the body to me." There was no testimony during said trial besides this answer of witness showing or tending to show who delivered said body to witness or identified the same to him, or that the body examined by witness was the body of John F. Turner, deceased, except as a statement of John W. Turner, when called as a witness for the prosecution, that he left his son's body (John F. Turner) at the railroad depot in Salt Lake City, with orders that it should be delivered to witness for witness to examine, but did not personally
64 communicate with witness about it, or see that it was delivered to witness; that the body was in a wood coffin inclosed in a box, which was also testified to by another witness who put the body in the coffin; and also the statement by witness that the body examined by him was on the platform at the railroad depot in Salt Lake City, and was in a wooden case and coffin; and also the substantial coincidence of time and general resemblance of injuries. There was testimony showing that the body which had been identified as the body of the deceased, John F. Turner (having injuries generally similar to those testified to by witness, Dr. Benedict), was placed in a metallic case covered by a wooden box, was shipped at Echo, by rail, to be conveyed to Salt Lake City, and that the same was shipped to Salt Lake City, and did arrive there, and was at the depot in Salt Lake City at or about the time testified to by witness, Dr. Benedict.

Dr. Benedict testified that the body he examined was enclosed in a wooden case and coffin, and said witness (on defendant's objection being overruled) proceeded to detail the condition of the corpse so examined by him and the nature of the injuries that caused the death of said person, how the blows causing death were probably inflicted, and the immediate consequence of said blows.

65 III. After the jury had been sworn to try the cause and during the progress of said trial the prosecution called as a witness one Jack Emerson, and after he had been sworn as a witness on part of the

prosecution and before he had testified, but after the prosecution had asked him a question to educe testimony, the defendant proved and the prosecution admitted in open court that said witness was serving out a sentence in the penitentiary; that against said witness judgment had been rendered upon a conviction for felony and upon a conviction of the crime of murder, and that he had not been pardoned nor had such judgment against him been reversed on appeal, but said judgment was in full force and effect; and after such proof and admission, and before the witness had testified, the defendant by his counsel objected to said witness testifying, and stated as the grounds of his objection that said witness was incompetent as a witness on account of the facts stated above as having been proved by defendant and admitted by the prosecution, and said objection having been submitted to the court the court overruled the same and ruled that said facts did not render said witness incompetent, and that he could testify, to which ruling of the court the defendant then and there duly excepts, and thereupon, at the request of the prosecution, said witness testified against defendant, and the testimony of said witness tended to implicate defendant in the crime charged in the indictment.

66

IV. After the jury had been sworn to try said cause, and during the progress of said trial, the counsel of defendant called as a witness T. J. Carr. Said Carr testified as follows: That he was a detective officer; that he arrested the defendant at the railroad depot at Cheyenne, Wyoming; that said arrest was on the charge set forth in the indictment in this cause; that John W. Turner, father of John F. Turner, the deceased, was present at the time of said arrest; was excited; may have made a motion to draw his revolver on defendant, but was not sure; that he may have prevented his drawing it; he thought he told him to do nothing rash. A large crowd gathered around the defendant, and witness hurried him to jail; witness sent the defendant on with a policeman and stayed behind, out of hearing of the policeman and defendant, for two or three minutes; he then caught up to the policeman and defendant, and immediately on his coming up with *with* them the defendant commenced making a confession; this was only a few minutes after the arrest; that witness did not know what took place between defendant and the policeman for the two or three minutes immediately prior to the confession; that so far as witness knew the confession was voluntary and influenced by hopes of reward or fear of punishment; that witness held out no inducement and did not know of any inducement being held out to defendant to confess. The foregoing was all the evidence during said trial showing or tending to show that said confession was voluntary or uninfluenced by hopes of reward or fear of punishment. The prosecution then asked witness to detail the confession so made by defendant. The defendant, by his counsel, objected to witness detailing said confession, stating as the grounds of his objection that the circumstances of his arrest hereinbefore stated showed the confession was not voluntary, and also that it was not affirmatively shown that the policeman held out no inducements to the defendant to confess, and that it must affirmatively appear that said confession was not influenced by fear of punishment nor by hopes of reward before the same would be admissible in evidence, and that it had not so appeared. The said objection of defendant being submitted to the court, the court overruled the same, to which ruling of the court the de-

67

68

fendant then and there duly excepted. The witness thereupon detailed said confession, which tended to implicate defendant in the crime charged in the indictment. Said policeman did not testify during said trial, but said Carr testified that said policeman was still in Cheyenne, Wyoming, where said Carr also resided at the time of trial. That before the jury retired the court, at the request of the defendant, gave to the jury the following instructions, to wit:

DEFENDANT'S REQUEST 2.

If the jury find from the evidence that defendant inflicted the blow that caused the death of the deceased, yet unless they are satisfied beyond a reasonable doubt that the blow was given deliberately and premeditatedly they cannot find him guilty of murder in the first degree. By the term "deliberate" is meant that the manner of the performance was determined upon after examination and reflection; that the consequences,
69 chances, and means were weighed, carefully considered, and estimated. By the term "premeditated" is meant that the act was planned, contrived, or schemed beforehand.

DEFENDANT'S REQUEST 3.

The defendant in this action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to an acquittal. If you believe from the evidence that the defendant is guilty of the crime of murder charged in the indictment, and there is reasonable ground of doubt whether he be guilty of murder in the first or the second degree, he can only be convicted of murder in the second degree.

DEFENDANT'S REQUEST 4.

Being satisfied beyond a reasonable doubt means that there must be in the minds of the jury an abiding conviction to a moral certainty of the truth of the charge, derived from a comparison and consideration of the evidence; they must be entirely satisfied of the guilt of the accused.

70 DEF'T'S REQUEST 5.

The evidence of verbal confessions of guilt is to be received by the jury with great caution. For, besides the danger of mistake from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear to make an untrue confession.

DEFENDANT'S REQUEST 7.

If the jury believe from the evidence that defendant, prior to the death of deceased, uttered threats against him, to make those threats evidence of malice for any purpose they would have to be uttered while the defendant

was in a sane state of mind, and would have to be uttered maliciously, seriously, with the intent to execute them.

DEFENDANT'S REQUEST 8.

If the jury believe from the evidence that defendant, prior to the death of deceased, uttered threats against him, to give those threats any weight as evidence of malice the jury must find that they were uttered seriously, and with intent to execute them.

71 DEF'T'S REQUEST 9.

The indictment in this case, stripped of its technical verbiage, charges that the defendant, within the jurisdiction of this court, killed one John F. Turner, intending to kill him. Included in the direct charge is an implied one, namely, that the intention was of a man in a state of sanity; a state of sanity means the state in which a man knows the act he is committing to be unlawful and wrong, and has reason sufficient to apply such knowledge and to be controlled by it. The defendant pleaded not guilty to the charge in the indictment, which plea puts in issue not only the commission of the act charged, but also the mental character of and the legal accountability for said act.

DEFENDANT'S REQUEST 10.

In order to constitute a crime a person committing the act charged as such must have intelligence and capacity enough to have a criminal intent and purpose, and if his reason and mental powers are either so deficient that he has no will, no conscience, nor controlling mental power, or if, through the overwhelming violence of mental disease, his intellect-
72 ual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

DEFENDANT'S REQUEST 11.

If the jury believe from the evidence that the defendant committed the act charged in the indictment, and if the evidence as to the insanity of the defendant, if there be any, should leave it in doubt as to whether he was insane at the time of the commission of the alleged crime, still if it also leaves in doubt his sanity at that *at that* time, he is entitled to an acquittal.

DEFENDANT'S REQUEST 12.

If the jury believe from the evidence that the defendant committed the act charged in the indictment, still if the jury cannot say beyond a reasonable doubt that the defendant was sane at the time of the commission of the alleged act, or cannot say whether at that time he was sane or insane, they are bound to acquit him.

DEFENDANT'S REQUEST 14.

You must bear in mind that the moral as well as the intellectual faculties

may be so disordered by disease as to deprive the mind of its controlling and directing power, and thereby deprive the person so affected of the ability to control his actions.

73 DEFENDANT'S REQUEST 15.

In order to constitute a crime a man must have memory and intelligence to know that the act he is about to commit is wrong; to remember and understand that if he commits the act he will be subject to punishment; and reason and will to enable him to compare and choose between the supposed advantage and gratification to be obtained by the criminal act and the immunity from punishment which he will secure by abstaining from it. If, on the other hand, he have not intelligence and capacity enough to have a criminal intent and purpose, and if his moral and intellectual powers are so deficient that he has not sufficient will, conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

DEFENDANT'S REQUEST 16.

To convict a person of crime he must have sufficient memory and intelligence to know that the act he is about to commit is wrong; to remember and understand that if he commits the act he will be subject to pun-
74 ishment, and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act and the immunity from punishment which he will secure by abstaining from it.

DEFENDANT'S REQUEST 17.

The defense of insanity is made out if the defendant satisfies the jury by a preponderance of evidence that he was insane at the time of the commission of the act charged in the indictment. It is not necessary that the jury should be satisfied beyond a reasonable doubt of the insanity of the defendant; it is sufficient if there is a preponderance of evidence that he is insane, and on that question the jury are to be controlled by such preponderance.

DEFENDANT'S REQUEST 18.

It is not essential that the defendant should introduce any evidence tending to show insanity to warrant an acquittal on the ground of insanity, provided that the evidence introduced by the prosecution satisfies the jury by a preponderance of evidence that the defendant was insane at the time of the commission of the act charged.

75 DEF'T'S REQUEST 20.

If the jury believe from the evidence that the defendant took no part in the killing of John F. Turner, and did not, prior to the killing act, in concert with the party or parties that did the killing, then, even though you

find that defendant was present at said killing, and did nothing to prevent it, and afterwards aided and assisted in concealing said killing, it is your duty to find him not guilty under this indictment.

DEFENDANT'S REQUEST 21.

If the jury believe that defendant made the confessions testified to, then in considering those confessions the jury must take the whole thereof as evidence, the statements made in his own favor as well as those made against him; and the statements made in his own favor are to be considered not merely as evidence that he made such assertions, but as admissible evidence of the matter thus alleged by him in his discharge.

76 The court, of its own motion, then charges the jury as follows:

THE PEOPLE OF THE TERRITORY OF UTAH)
vs.
FRED WELCOME AND JACK EMERSON.)

The defendant Frederick Welcome, alias Fred Hopt, impleaded with Jack Emerson, stands indicted by the grand jury of this the third judicial district of the Territory of Utah of the crime of murder in the first degree, alleged to have been committed on or about the 3rd day of July, A. D. 1880, at the county of Summit, in said Territory, in and upon one John F. Turner. He is now on trial before you charged with the said offense, and you are called upon to declare whether the prosecution has made out its case, whether the defendant was guilty or innocent.

Murder, as defined by the statutes of this Territory (sections 1917, 1918, and 1919, Compiled Laws, pages 585 and 586), is the unlawful killing of a human being with malice aforethought. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malicious heart.

77 Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing, or committed in the perpetration of or attempt to perpetrate any arson, rape, burglary, or robbery, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any other human being other than him who is killed, or perpetrated by any act greatly dangerous to the lives of other, and evidencing a depraved mind regardless of human life, is murder in the first degree. Any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree.

Section 168 of criminal procedure, acts of 1878, page 95, of Utah Territory, provides that "the distinction between an accessory before the fact and a principal and between principals in the first and second degree in cases of felony is abrogated, and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid or abet in its commission, though not present, shall hereafter
78 be indicted, tried, and punished as principals." This was the law of this Territory at the date of the alleged offense charged in the

indictment against the defendant now on trial, and since then at all times has been and is now the law of this Territory.

All persons concerned in the commission of a felony before the fact are principals, and are to be indicted, tried, and punished as such. If you should find that the defendant was concerned in the commission of the act of killing the deceased, John F. Turner, before the infliction of the act resulting in the death, he is a principal, and is to be indicted. tried, and punished as such.

In dividing murder into two degrees the legislature intended to assign to the first, as deserving of greater punishment, all murders of a cruel and aggravated character, and to the second all other kinds of murder which are murder at common law, and to establish a test by which the degree of every case of murder may be readily ascertained. That test may be thus stated: Is the killing wilful, that is to say, intentional, deliberate, and premeditated? If it is, the case falls within the first; and if not, within the second degree. There are certain kinds of murder which carry
79 with them conclusive evidence of premeditation. These the legislature has enumerated in the statute, and has taken upon itself the responsibility of saying that they shall be deemed and held to be murder in the first degree. First, where the killing is perpetrated by *by* poison or lying in wait. Here the means used is held to be conclusive evidence of premeditation. The second is where the killing is done in the perpetration of or attempt to perpetrate any of the felonies enumerated, viz, arson, rape, burglary, or robbery, or from a premeditated design unlawfully and maliciously to effect the death of any other human being other than him who is killed, or by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life. Here the occasion is made conclusive evidence of premeditation.

Where the case comes within either of these clas'es the test question, Is the killing wilful, deliberate. malicious, and premeditated? is answered by the statute itself, and the jury have no option but to find the prisoner guilty in the first degree. Hence, so far as these two cases are concerned, all difficulty as to question of degree is removed by the statute.
80 But there is another and much larger class of cases included in the definition of murder in the first degree which are of equal cruelty and aggravation with those enumerated, and which, owing to the different and countless forms which murder assumes, it is impossible to describe in the statute. In this class the legislature leaves the jury to determine from all the evidence before them the degree of the crime, but prescribes for the government of their deliberations the same test which has been used by itself in determining the degree of the other two classes, to wit, the deliberate and preconceived intent to kill. It is only in the latter *of* class of cases that any difficulty is experienced in drawing the distinction between murder of the first and murder of the second degree, and this difficulty is more apparent than real.

The unlawful killing must be accompanied with a deliberate, clear intent, with malice aforethought, to take life in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection, and
81 not upon a sudden heat of passion sufficient to preclude the idea of deliberation. There need be no appreciable space of time between

the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, and if such is the case the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other or how quickly they may be followed by the act of killing. It follows, therefore, from what I have thus charged you, that to constitute murder in the first degree the killing must have been unlawful and with malice aforethought, and must have been wilful, deliberate, and premeditated. Our statutes further provide that to make the crime murder the party must have died within a year and a day after the stroke received or the cause of death administered, in the computation of which the whole of the day in which the act was done shall be reckoned the first.

82 The term malice is used in a technical sense, and includes in its definition not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action following from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent on mischief, and therefore malice is implied from any deliberate or cruel act against another, however sudden.

The terms deliberation and premeditation contemplate and mean that the party committing the act must have deliberated and premeditated upon doing the act before its commission. As before said, in deliberation there need be no appreciable space of time between the intention to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part

83 of the slayer, and, if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing, if the death occurred within a year and a day, reckoned as before stated. In saying that no particular length of time is necessary for deliberation or premeditation in murder of the first degree, I wish you to understand that actual deliberation and premeditation of the intended murder is necessary, and that, too, while the accused is calm and cool enough to reflect upon the act he is about to do, but the length of time of such deliberation is immaterial.

Under the statutes of this Territory (Laws of Utah, 1878, subdivision 7 of section 257, page 115) you are instructed that you are the sole judges of the credibility of the witnesses and the weight of the evidence and of the facts; and you are also further instructed that the defendant is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to an acquittal.

84 A reasonable doubt is such an one as would arise in the minds of reasonable men on any subject; just such men as you are, who are selected because you are reasonable, competent men to try such a question. Proof beyond a reasonable doubt is such as will produce an abiding convic-

tion in the mind, to a moral certainty that the fact exists that is claimed to exist—that the fact to be proven actually exists; such proof as produces an abiding conviction in the mind of moral certainty that the fact exists, so that you feel certain that it exists. A balance of proof is not sufficient.

A balance of evidence is that which you think is most likely to have been the fact; the way your minds preponderate upon a question of fact. That makes out a balance; but that will not answer here. You must go beyond that. There must not only be a balance of proof, but there must be this full measure of proof which removes all reasonable doubt—all doubt that arises in your minds as reasonable and produces an abiding conviction to a moral certainty that the facts charged exist. Proof
85 beyond a possibility of doubt is not required, because such proof can never be made. It is not to be shown to you that it is not possible that this respondent is innocent, to show beyond all possibility of doubt that he is guilty. But it is required of the prosecution to produce such evidence that when you look it over as reasonable men no doubt arises in your minds, that no reasonable, fair doubt as to any fact necessary to make out the crime charged upon the respondent. You will recollect that in rendering your verdict you do not as is sometimes stated swear that the defendant is either guilty or not guilty. The jury swear no such thing. They declare in rendering the verdict the result of their minds from the evidence produced, being sworn to return a true verdict according to the evidence. The prosecution in this case has introduced a vast amount of circumstantial evidence. Evidence is ordinarily divided into two kinds, viz, direct and circumstantial. Direct when the witness testifies to the principal fact in issue, as when a murder is committed the witness
86 testifies that he saw the blow inflicted which resulted in death, and the person by whom it was inflicted. In such case the truth of the witness testifying is the main subject of inquiry.

In circumstantial testimony there is the fact proving and the fact proved inferentially from the fact given in testimony. The circumstances must be proved to the satisfaction of the jury, and it is for them to say when that is done, and then to draw the inference from the fact or circumstance thus proved. Each kind of evidence is entirely legal and competent, and will sustain a conviction if it produces in the minds of the jury a belief beyond a reasonable doubt of the guilt of the accused; but each and every of the circumstances should be consistent only with the theory of guilt. All evidence is more of less circumstantial, the difference being in degree. It is of a nature identical with direct evidence, the distinction being that by direct evidence is intended evidence which applies directly to the fact which forms the subject of inquiry. Circumstantial evidence is equally direct in its nature, but, as its name imports, it is direct evidence of
87 a minor fact, a fact incidental to or usually connected with some other fact as its incident, and from which each other fact is inferred. In order to convict, all the circumstances taken together must be sufficient to exclude all disbelief, for you who pass upon the question are not at liberty to disbelieve as jurors, while as the result of the evidence in the case you believe as men; it is enough to convict that your consciences are clear and your judgment satisfied beyond a reasonable doubt.

The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the

indictment, and when it appears to the jury from the evidence adduced on the trial that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only. In this case murder in the second degree is an offense included in that with which the defendant is charged in the indictment.

Drunkenness is not an excuse for crime; but as in all cases
88 where a jury find a defendant guilty of murder they have to determine the degree of the crime, it becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered where the homicide is not committed by means of poison or lying in wait, or in the perpetration or attempt to perpetrate any arson, rape, burglary, or robbery, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any other human being than him who is killed, or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life.

The degree of the offense depends entirely upon the question whether the killing was wilful, deliberate, and premeditated, with malice aforethought, and upon that question it is proper for the jury to consider evidence of intoxication, if such there be, not upon the ground that drunkenness renders
a criminal act less criminal, or can be received in extenuation or excuse,
89 but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after, in order to justly determine the question as to whether his mind was capable of that deliberation, or premeditation, or malice aforethought, which, according as they are absent or present, determine the degree of the crime.

Section 273 of the criminal procedure act of this Territory (Laws 1878, page 118) provides that "a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstance thereof."

You are instructed that unless the testimony of the accomplice is corroborated by other evidence which in itself tends to connect the defendant with the commission of the offense charged you cannot under this statute last above referred to and quoted convict the defendant on the testimony of Jack Emerson alone. If, however, there is other evidence tend-
90 ing in itself to convict the defendant with the commission of the offense charged you can consider the testimony of Emerson in arriving at your verdict. The corroborative testimony will not admit of your considering it with the testimony of Emerson if it only goes to show or has relation to the fact that an offense has been committed or the circumstances of it. It must be of that nature which in itself tends to connect and does connect the defendant with the commission of the offense. It need not of course be sufficient to establish the guilt of defendant, for in that event the testimony of Emerson, the accomplice, would not be needed. But it must tend in some slight degree at least to implicate the defendant. The purpose of the statute was to prohibit a conviction unless there was some evidence entirely exclusive of that of Emerson, which of

itself and without the aid of Emerson's testimony tended to raise at least a suspicion of the guilt of the defendant. The burden of the proof is upon the prosecution in this case. It does not shift in criminal cases,
91 but is upon the prosecution throughout to establish defendant's guilt beyond a reasonable doubt. You are not to find that defendant is properly suspected, or that he is probably guilty, or that there is a preponderance of evidence against him, but before you bring in a verdict of guilty you must find as a matter of fact beyond a reasonable doubt that the defendant committed the offense. The law clothes the defendant with the presumption of innocence, which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt, which means that the evidence of his guilt must be clear, positive, and abiding, fully satisfying the minds and consciences of the jury. It is not sufficient in a criminal case to justify a verdict of guilty that there may be a strong probability of guilt nor a preponderance of evidence against defendant, but what the law requires is proof by legal and credible evidence of such a nature that when it is all considered by the jury, giving to it its natural effect, they feel when they have considered it all, a clear, undoubting, and entirely satisfactory conviction of defendant's guilt. They must
92 be entirely satisfied of the guilt of the accused. If the defendant's guilt be thus proved the jury should find him guilty; if not, they should acquit.

If you find the defendant guilty, you will be careful to say in your verdict the degree of the crime of which you find him guilty. If you find the defendant not guilty, you will say so in the verdict.

Gentlemen, I have in as concise a manner as it is possible for me to state to you what is the law of this case, and by which you are to be governed in your deliberations. You will apply the facts and circumstances of this case to the law, and render your verdict accordingly. That an atrocious and dastardly murder has been committed by some person is apparent but in your deliberations you should be careful not to be influenced by any feeling. Consider the case as jurors sworn to do your solemn, legal duty, regardless of surroundings, and render your verdict in strict accordance with the law as it has been given to you, and with the evidence as it has been detailed. While it is your duty to see that the law
93 of the country is vindicated and that the defendant, if he be the guilty party, receives the just reward of his conduct, you are also bound to see that he is not convicted if there is reasonable doubt of his guilt. Go to your retirement, gentlemen, with a full appreciation of the duty imposed upon you, and render your verdict as cool and dispassionate men, uninfluenced by any other feeling than that of doing exact and positive justice to the law and the accused.

All of which instructions were reduced to writing before they were given, and were filed in the case.

VI. That on the 29th day of March, 1883, and prior to judgment having been rendered in said cause, said defendant (after due notice that said motion would be made to the United States district attorney, representing the people), in open court, said United States district attorney being present, made the following motion for a new trial of said cause, to wit:

In the district court of the third judicial district of Utah Territory, county of Salt Lake.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED UNDER THE NAME of Fred Welcome and impleaded with another. } Motion for a new trial.

94 The defendant, Frederick Hopt, respectfully moves the court to vacate and set aside the verdict heretofore rendered in the above-entitled cause on the 9th of March, 1883, and to grant a new trial of said cause upon the following grounds, to wit:

1. That a part of said trial was had in the absence of said defendant, to wit, in every case where a juror was challenged by defendant for actual bias said juror was examined by the triers in the absence of defendant, and said challenge was found not true.

2. That said court misdirected the jury in a matter of law, to wit, in giving the last instruction given by said court to said jury and instructing them therein "that an atrocious and dastardly murder has been committed by some person is apparent."

And said court erred in the decision of question' of law arising during the course of the trial, to wit:

1. In permitting witness J. M. Benedict to answer when asked by the prosecution who identified to him the body examined by him as the body of John F. Turner, and in overruling the defendant's objection thereto, defendant's objection thereto being that the question called
95 for and would bring before the jury hearsay and unsworn evidence.

2d. In permitting T. J. Carr to detail a confession made to him by defendant a few minutes after defendant's arrest, and in overruling defendant's objection thereto, first, that said confession was induced by hopes of reward or fear of punishment; second, that it had not affirmatively appeared that it was not so induced.

3d. In permitting Jack Emerson to testify against defendant, and in overruling defendant's objection thereto, to wit, that said Emerson had been convicted and sentenced for an infamous offense, that judgment had been rendered against said Emerson upon a conviction for felony, and that he had not been pardoned nor had such judgment been reversed on appeal.

LEE J. SHARP AND
JOHN A. MARSHALL,
Att'ys for Def'ts.

That after said motion was made and submitted to the court the court took the same under advisement, and on the 2nd day of April, 1883, said court overruled said motion and denied the same; to which ruling of the court the defendant then and there duly excepted.

96 That the following is a statement of the matters and things occurring at the trial, and so much of the evidence as is necessary to explain the grounds on which said motion was made, and to present the question of law upon which the exception to the order of said court overruling said motion for a new trial was taken, to wit:

1. That said cause, coming on regularly for trial at the February term of said court, and on the 2nd day of March, 1883, of said term, the defendant being personally present and being also represented by counsel, and the United States district attorney for Utah Territory being also present and representing the people, the court ordered a jury to be called in said cause, and the jurors having been called, and after they appeared, and said jurors (among whom were those hereinafter named) having been truly sworn to answer truly such questions as might be put to them touching their competency to sit as trial jurors in said cause, and before the jurors hereafter named were sworn as trial jurors, counsel for the defend-
97 ant proceeded to examine said jurors, and among others examined the following jurors, to wit: Samuel F. Lee, John South, George Coulain, Reubin Chesbish, Thomas S. Snarr, and James C. Hamilton. After examining each of said jurors on their voir dire (and before they were respectively sworn as trial jurors) the defendant challenged each of said jurors for actual bias, and at the time of each challenge stated as his cause of challenge subdivision 2 of § 241 of the Code of Criminal Procedure of Utah Territory (Laws of 1878), to wit: "For the existence of a state of mind on the part of the juror which leads to a just inference in reference to the case that he will not act with entire impartiality." The district attorney, for the people, in each case denied the facts alleged as the ground of challenge. The court thereupon for each juror so challenged appointed three triers to try the challenge, and in each case said triers were duly sworn, in accordance with the statute in such case made and provided, to try said challenge, and in each case, immediately after being sworn and before proceeding to try the challenge, the court read to them as
98 their instructions § 252 of the Code of Criminal Procedure of Utah Territory, after which in each case the triers took the juror with them out of the presence of the court and out of the court-room, and out of the presence of the defendant, and in the absence of the court and of the defendant, and in a different room from the court and the defendant, and in the absence of any one representing the defendant, the triers proceeded to and did try said challenge as to each juror and agree upon their verdict, and in each case returned into court and reported that they found the challenge not true, and thereupon the court permitted such juror so challenged to resume his seat in the jury-box as a juror. All of the said jurors so challenged, with the exception of Thomas S. Snarr and James C. Hamilton, were thereafter peremptor'y challenged by defendant, but said Snarr was sworn as a trial juror in said cause; and said Hamilton was so challenged for actual bias after defendant had exhausted all the peremptory challenges allowed him by law, and said Hamilton was also sworn as a trial
99 juror in said cause; and both said Snarr and said Hamilton served as such trial jurors and joined in the verdict rendered by said jury. The defendant exhausted all the peremptory challenges allowed him by law. No objection was made to said triers retiring from the court-room, or exception taken thereto during the progress of said trial. No witnesses or testimony were produced by either the prosecution or defense before said triers at the trial of either of said challenges. The proposed juror was examined by the triers and no other evidence offered or received.

3. Paragraph II of this bill of exceptions is hereby referred to and made a part hereof.

4. Paragraph IV of this bill of exceptions is hereby referred to and made a part hereof.

5. Paragraph III of this bill of exceptions is hereby referred to and made a part hereof.

VII. That on the 29th day of March, 1883, due notice thereof having been given to the United States district attorney for Utah Territory, in open court, the said district attorney being present, the defendant
100 made the following motion in said cause to said court:

In the district court of the third judicial district of Utah Territory.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED UNDER THE NAME of Fred Welcome.

Now comes said defendant and moves said court to indorse every instruction given to the jury by the court, on its own motion, at the trial heretofore had in the above-entitled cause during the present term of court, in accordance with the facts, and so as to show the action of the court thereon.

M'ch 29th, 1883.

LEE J. SHARP AND
JOHN A. MARSHALL,
Att'ys for Def't.

And after said motion had been argued by counsel for the def't in favor of said motion, and by the said district attorney in opposition thereto, the court overruled and denied the same; to which ruling of the court the defendant then and there excepted. That said motion was so made
101 during the same term of said court at which the trial of said cause was had, and was so made prior to the motion for a new trial in said cause, and prior to judgment having been rendered in said cause. That at said trial of said cause the court gave several instructions to the jury of its own motion, which instructions were reduced to writing before they were given and were filed in said cause, but none of said instructions were indorsed so as to show the action of the court thereon, or in any manner.

Assignments of errors.

I. The court erred in permitting a portion of said trial to be conducted in the absence of defendant and in the absence of any one representing the defendant.

II. The court erred in overruling defendant's objection to Dr. J. M. Benedict's answering the question as to who identified the body to him as the body of John F. Turner, and in permitting said witness to answer, as shown in paragraph II of this bill of exceptions.

III. The court erred in permitting Jack Emerson to testify, as shown in paragraph III of this bill of exceptions.

102 IV. The court erred in permitting T. J. Carr to detail defendant's confession to him, as shown in paragraph IV of this bill of exceptions.

V. The court erred in giving the last instruction given by said court to the jury, and in instructing the jury therein "that an atrocious and dastardly murder has been committed by some person is apparent." Said instruction is not numbered.

VI. The court erred in overruling and denying defendant's motion for a new trial, as shown in paragraph VI of this bill of exceptions.

VII. The court erred in refusing to indorse the instructions given by the court on its own motion, as shown in paragraph VII in this bill of exceptions.

And whereas said court extended the time in which to have settled, signed, and filed the foregoing bill of exceptions until the 10th day of April, 1883; and inasmuch as the matters aforesaid do not appear of record, the defendant, by his counsel, present the foregoing bill of exceptions, and pray that the same may be settled and signed and made a part of the record in said cause; and it is done accordingly this 3rd day of April, 1883, after judgment has been rendered in said cause.

JOHN A. HUNTER, *Judge.*

103 (Indorsed:) 3rd dist. court Utah. The People, &c., vs. Fred'k Hopt, &c. Bill of exceptions. Filed April 6th, 1883. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

104 TERRITORY OF UTAH,
County of Salt Lake, ss:

I O. J. Averill, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original indictment, with endorsements thereon; minute entry of arraignment and plea of def't in open court, Dec. 17, 1880; minutes of court appearing on the journal; thereof on trial of case and empanelling of jury, March 2d to 9th, 1883; verdict of the jury; instructions given by the court on its own motion; instructions asked by def't and given by the court; instructions requested by def't and given by the court in its own charge; order of the court fixing time for sentence; motion and notice of motion for new trial; stipulation and order extending time for def't to file bill of exceptions; order overruling motion to indorse instructions; order and reasons for overruling motion for new trial; judgment and sentence of the court; notice of appeal, and def't's bill of exceptions in the above-entitled action, on file and of record in my office.

Witness my hand and the seal of said court this 7th day of April, 1883.

[SEAL.] O. J. AVERILL, *Clerk,*
By H. G. McMILLAN, *Deputy Clerk.*

105 (Indorsed:) The People, &c., vs. Fred'k Hopt. Transcript on appeal. Filed April 10th, 1883. E. T. Sprague, clerk of supreme court.

106 Regular June term, A. D. 1883.

MONDAY, *June 18th, A. D.* 1883.

A session of the supreme court of Utah Territory was held this day, beginning at 12 o'clock m., pursuant to the proclamation of the governor.

Present and presiding: His honor John A. Hunter, chief justice; his

honor P. H. Emerson, associate justice; and his honor S. P. Twiss, associate justice.

Present also: E. T. Sprague, clerk, the marshal, and members of the bar.

Court was duly opened.

* * * * * * *

THE PEOPLE OF THE TERRITORY OF UTAH, respondents, *vs.* FREDERICK HOPT, APPELLANT. } From 3d dist.

This cause, coming on regularly for hearing, was argued by Mr. Van Zile and Mr. Brown for The People, and by Messrs. Sharp and J. A. Marshall for appellant.

Submitted and taken under advisement.

107 WEDNESDAY, *July 11th, A. D.* 1883.

* * * * * * *

THE PEOPLE OF THE TERRITORY OF UTAH, respondents, *vs.* FREDERICK HOPT, APPELLANT. } From 3d dist.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here ordered and adjudged (Twiss, J., dissenting) that all and singular the judgment, order denying new trial, and sentence of the district court of the 3d judicial district, save as to the time of the execution thereof, be, and the same are hereby, affirmed, and said cause is remanded to and said district court is hereby directed to set and fix a day for carrying into execution the sentence and judgment so affirmed.

108 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, greeting:

Because in the record and proceedings as also in the rendition of the judgement, order, and decree in a suit which is in the said supreme court of the Territory of Utah, before you, in which The People of the Territory of Utah are plaintiffs and respondents and Frederick Hopt, alias Frederick Welcome, impleaded with another, is defendant and appellant, manifest error hath happened to the great damage of the said Frederick Hopt: we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United

109 States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings

aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of said Supreme Court of the United States, and the seal of the supreme court of Utah Territory, the 17th day of July, A. D. 1883.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

(Indorsed:) People, &c., vs. Fred Hopt, imp. Writ of error. Filed July 17th, 1883. E. T. Sprague, clerk.

110 The United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Utah, wherein Frederick Hopt is plaintiff in error and you, The People of the Territory of Utah, defendants in error, to show cause, if any there be, why the judgement rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, chief justice of the Supreme Court of the United States, this seventeenth day of July, in year of our Lord one thousand eight hundred and eighty-three.

JOHN A. HUNTER,
Chief Justice of the Supreme Court of the Territory of Utah.

(Indorsed:) Frederick Hopt vs. People of Utah Territory. Citation.

Due service of the within citation admitted this 17th day of July, A. D. 1883.

P. T. VAN ZILE,
U. S. District Att'y, Attorney for the People of Utah Territory.

Filed 17' July, 1883.

E. T. SPRAGUE, *Clerk.*

111 UNITED STATES OF AMERICA:

In the Supreme Court of the United States in error to the supreme court of the Territory of Utah.

FREDERICK HOPT, PLAINTIFF IN ERROR,
vs.
THE PEOPLE OF THE TERRITORY OF UTAH, DEFENDANTS IN ERROR.

TERRITORY OF UTAH,
County of Salt Lake, ss:

These affiants, John A. Marshall and Lee J. Sharp, make oath and say each for himself, and not one for the other, that he was assigned by the district court in and for the third judicial district, Utah Territory, to

the defence of Frederick Hopt, the above-named plaintiff in error; that he has not received any compensation or reward as attorney in said cause, and has not the promise or hope of reward for any services rendered or that he may render in said cause; that as affiant is informed and believes said plaintiff in error is a pauper and unable to employ counsel or to pay the costs of the trial.

JOHN A. MARSHALL.
LEE J. SHARP.

112 Subscribed & sworn to before me this 17th day of July, 1883.
[SEAL.] W. C. HALL, *Notary Public.*

(Indorsed:) People of Utah Territory vs. Frederick Hopt. Aff'd't of pauperism. Filed this 17th day of July, 1883. E. T. Sprague, clerk sup. court.

113 UNITED STATES OF AMERICA:

In the Supreme Court of the United States in error to the supreme court of the Territory of Utah.

FREDERICK HOPT, PLAINTIFF IN ERROR,
vs.
THE PEOPLE OF THE TERRITORY OF UTAH, DEFENDANTS IN ERROR.

Now comes the said Frederick Hopt, by Thomas Marshall, Hall & Marshall, and Lee J. Sharp, his attorneys, and says there is manifest error in the record and proceedings and judgements of the supreme court of the Territory of Utah, and assign the following as error, to wit:

The supreme court erred in affirming the judgement of the district court, wherein and whereby it was adjudged that the said plaintiff in error should be hanged by the neck until he was dead; also in affirming the judegment and order of the district court overruling the motion of the plaintiff in error for a new trial, for the following reasons and assignments of error, to wit:

114 FIRST. The district court erred in permitting a portion of said trial to be conducted in the absence of defendant and in the absence of any one representing the defendant.

SECOND. The said court erred in overruling defendant's objection to Dr. J. M. Benedict's answering the question as to who identified the body to him as the body of John F. Turner, and in permitting said witness to answer. (See paragraph II, bill of exceptions.)

THIRD. The said court erred in permitting Jack Emerson to testify. (See paragraph III, bill of exceptions.)

FOURTH. The said court erred in permitting T. J. Carr to detail defendant's confession to him. (See paragraph IV, bill of exceptions.)

115 FIFTH. The said court erred in giving the last instruction given by said court to the jury, and in instructing the jury therein, "That an atrocious and dastardly murder has been committed by some person is apparent."

SIXTH. The said court erred in overruling and denying defendant's motion for a new trial. (See paragraph VI, bill of exceptions.)

SEVENTH. The said court erred in refusing to endorse the instructions given by the court on its own motion. (See paragraph VII, bill of exceptions.)

The plaintiff in error therefore prays that said judgement and decision of the supreme court of the Territory of Utah affirming said judgement and said order may be reversed, and that a mandate may issue from this honorable court directing the said supreme court of said Territory to reverse the judgement and order of the district court, and remand the case to the said district court with an order to said district court
116 to grant said plaintiff in error a new trial.

THOMAS MARSHALL,
HALL & MARSHALL, and
LEE J. SHARP,
Atty's for Pl'ff in Error.

(Indorsed:) People of Utah Territory vs. Frederick Hopt. Assignments of errors. Filed this 17th July, 1883. E. T. Sprague, clerk sup. court.

117 TERRITORY OF UTAH,
Salt Lake County, ss:

I, E. T. Sprague, clerk of the supreme court of Utah Territory, in pursuance of the annexed writ of error, do herewith return to the Supreme Court of the United States said writ, the citation issued thereon, a transcript of the record and proceedings in and of said supreme court of Utah Territory, an affidavit of pauperism, and assignment of errors—all in the cause in said writ mentioned; and I hereby certify that said transcript of the said record and proceedings, said affidavit and assignment of errors, is a true, full, and correct copy of the several originals thereof on file or of record in my office.

Witness my hand and the seal of said supreme court of Utah Territory, this 24th day of Sept., A. D. 1883, at Salt Lake City.

[SEAL.] E. T. SPRAGUE,
Clerk Supreme Court.

(Indorsement on cover:) No. 1043. Frederick Hopt, plaintiff in error, vs. The People of the Territory of Utah. Utah Territory supreme court. Filed 6th October, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1043.

FREDERICK HOFT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE TERRITORY OF UTAH.

BRIEF FOR PLAINTIFF IN ERROR.

THOMAS MARSHALL,
LEE J. SHARP,
HALL & MARSHALL,
Attys. for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1883.

No. 1043.

FREDERICK HOPT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE TERRITORY OF UTAH.

BRIEF FOR PLAINTIFF IN ERROR.

The plaintiff in error is indicted for murder in the first degree by the grand jury of the Third Judicial District of the Territory of Utah, on the 14th day of December, 1880; was afterwards arraigned and pleaded not guilty. He has been twice tried under said indictment; his trial commenced on the 2d day of March, 1883, and on the 9th day of said month the jury found him guilty of murder in the first degree; and on the 2d day of April, 1883, the court rendered judgment against the defendant (said plaintiff in error) and sentenced him to be hanged. This judgment was affirmed by the Supreme Court of Utah Territory on the 11th day of July, 1883, and the plaintiff in error thereupon sued out this writ of error.

ASSIGNMENT OF ERRORS.

See Transcript, p. 38.

The Supreme Court of Utah erred in affirming the judgment of the District Court, wherein and whereby it was adjudged that the said plaintiff in error should be hanged by the neck until he was dead, for the following reasons and assignment of error, to-wit:

I.

The Court erred in permitting a portion of said trial to be conducted in the absence of defendant and in the absence of any one representing the defendant.

II.

The Court erred in overruling defendant's objection to Dr. J. M. Benedict answering the question as to who identified the body to him as the body of John F. Turner, and in permitting said witness to answer. (See paragraph II. Transcript, p. 21.)

III.

The Court erred in permitting Jack Emerson to testify. (See paragraph III, Transcript p. 21.)

IV.

The Court erred in permitting T. J. Carr to detail defendant's confession to him. (See paragraph IV, Transcript p. 22.)

V.

The Court erred in giving the last instruction given by said Court to the jury and in instructing the jury therein, "That an atrocious and dastardly murder has been committed by some person is apparent."

FIRST.

The first error complained of is that a part of the trial was had in the absence of the defendant, to-wit: whenever a proposed juror was challenged for actual bias, the court appointed three triers, who took the juror out of the court room, and in the absence of the court, and of the defendant, and of any one representing the defendant, examined the juror and determined the challenge; one of the proposed jurors so challenged for actual bias was James C. Hamilton, who was thus challenged after defendant had exhausted the peremptory challenges allowed him by law, and who, after said challenge was tried as above and the challenge found not true, was sworn as a juror in the case and participated in finding the verdict against the defendant (Transcript of Record p. 3). This appears in the minutes of the trial court, which are made a part of the record of the action by § 339 subdivision 3 of the Code of Crim. Proc. of Utah, Laws of 1878. It is provided by the laws of Utah that "if the indictment be for a felony the defendant must be personally present at the trial. * * " § 218 Code Crim. Proc.; and that the trial of such challenges for actual bias was a part of defendant's trial at which he had a right to be present, to make objections to questions asked, and take exceptions to the rulings of the court thereon. See §§ 246-253 inclusive, and §309 Code Crim. Proc. of Utah.

43 N. Y. 1 Maurer vs. People.
5 Cal. 347 People vs. Rogers.
49 Cal. 166 People vs. Cotta.
13 Wend. 10 Purple vs. Horten.
3 Bacon's Abridgment 755.

The defendant in a criminal action has a right to be present at every proceeding had during his trial at which he might be injured, so under statutes similar to ours where a jury have been allowed to view the place where an offense is charged to have been committed, it has been held that the defendant had a right to be present at such viewing although he was precluded from addressing the jury.

30 Ark. 328 Benton vs. State.

How much greater would be the importance pf his being present at a proceeding at which he would have the right to introduce witnesses and to testify himself, (§250 Code Crim. Proc.;) and also object to the admission of incompetent evidence and to except to the rulings of the Court thereon, (§§ 250 and 309 Crim. Proc.)

The appellant could not waive this right nor cure the error committed in disregarding the same by not objecting or saving an exception at the time.

§ 218 Code Crim. Proc.
Cooley,s Const. Limitations 319.
§ 3364 Wharton on Criminal Law.
69 Pa. St. 286 Dougherty vs. Com.
6 Barr 385 Dunn vs. Com.
43 N. Y. 1 Maurer vs. People.
47 Ill. 325 Dempsey vs. People.
5 Cal, 72 People vs. Ernest Kohler.
2 W. Va 579 Younger vs. State.

Even an express consent of counsel for defendant, (and there was no consent in the case at bar,) would not have validated any part of his trial had in his absence. See cases above cited.

SECOND.

The second error complained of by plaintiff in error, is that Dr. Benedict, a witness on behalf of the prosecution, was allowed to state (over defendant's objection that it was hearsay) that some man pointed out and identified to him a body as the body of John F. Turner, with the murder of whom defendant in the court below was accused by the indictment in this action; when this is

taken in connection with the other evidence (see Transcript of Record p. 21, paragraph II.), to-wit: that Dr. Benedict did not recognize the body, that no witness testified that he pointed out or identified the body to Dr. Benedict, or knew that the body seen and examined by Dr. Benedict was the body of John F. Turner, the error committed and the injury to defendant thereby is but rendered the more apparent. The evidence objected to was clearly hearsay; it was bringing before the jury the unsworn and extrajudicial statement of a third person that the body seen and examined by witness was the body of John F. Turner, something that the witness testifying did not know and could not swear to. This was error.

Wharton's Law of Evidence § 172, sub. 2, § 175.
7 Cranch. 296 Mima Queen vs. Hepburn.
1 Greenl. on Ev. § 99.

Hearsay, in its legal sense, is not confined to that which is said. Men may express themselves by conduct as well as by words; and to repeat what they said by words is no more hearsay than to repeat what they said by conduct.

Wharton's Law of Evidence § 173.

THIRD.

The third error complained of by plaintiff in error is that the Court against defendant's objection, permitted Jack Emerson to testify against defendant; judgment having been rendered against said Emerson upon a conviction for murder, and said judgment being in full force and effect at the time he was so permitted to testify (see paragraph III. transcript p. 21). The homicide, for the commission of which defendant has been sentenced, is charged to have been committed on the 3d of July, 1880 (see indictment.) And the indictment therefor was filed in court Dec. 14th, 1880, Transcript p. 1.

The Criminal Procedure Act 1878, §420, is as follows:

"The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this Act."

At the time of the adoption of the above section and from that time up to March 9th, 1882, there were in force in the Civil Practice Act two sections that are pertinent to this objection; to-wit:

"(1599) Sec. 374. All persons, without exception, otherwise than as specified in this chapter, may be witnesses in any action or proceeding. Facts which, by the common law, would cause the exclusion of witnesses may still be shown for the purpose of affecting their credibility."

Compiled Laws, p. 505.

And in the same chapter:

"(1603) Sec. 378. Persons against whom judgment has been rendered upon a conviction for felony, unless pardoned by the governor, or such judgment has been reversed on appeal, shall not be witnesses."

Compiled Laws, p. 506.

On the 9th day of March, 1882, there was passed an act amendatory of the Compiled Laws in which is found the following section; to-wit:

"Sec. 29. Section 1603 is hereby repealed."

Laws of 1882 p. 79.

Under this assignment of error two points are made by plaintiff in error.

FIRST. That the repealing section (Sec. 29) in repealing a section of the Civil Practice Act did not and was not intended to affect the Criminal Practice Act. Section 420 of the Crim. Proc. Act adopted certain rules of the Civil Practice Act as they then existed but did not adopt all future modifications of those rules, from the nature of the two acts it being highly probable that the future modifications of those rules of the Civil Practice Act would be inapplicable to the Criminal Practice Act. It is too well settled to need any citation of authority that the Civil and Criminal Practice Acts are distinct and complete in themselves and that no provision of the one applies to the other unless specially adopted by it.

17 Indiana 488. Hoagland vs. State

SECOND. In respect to the case at bar and as construed by the court below the repealing section (Sec. 29) is an *ex post facto* law, within the meaning of Sec. 10, Art. 1, of the Constitution of the United States,

Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender is an *ex post facto* law in respect to that offense.

3 Dallas 386, Calder vs. Bull.

107 U. S. 221, Kring vs. Missouri.

Every law passed after the commission of an offence which institutes a new rule of evidence in aid of conviction is an *ex post facto* law.

4 Wall. 277, Cummings vs. State.
4 Wall. 333, Ex parte Garland.

In the case at bar evidence that was clearly inadmissible at the time the offense was committed (namely the evidence of a convicted felon) was admitted by virtue of a statute subsequently passed instituting a new rule of evidence in aid of conviction.

But it may be argued that the repealing act, as it is simply directed at the qualifications of witnesses, does not change a *rule of evidence*. This is a distinction without a difference. In the early case of Calder vs. Bull, cited ante, the learned judge, in discussing the general doctrine of *ex post facto* laws and the section of the Constitution relating thereto, instances as one of the evils against which that section was intended to operate, a law providing for the admission of the *testimony of the wife against the husband* when the laws at the time the offense was committed prevented her from so testifying.

3 Dallas 389, Calder vs. Bull.

And on principle it is difficult to see a distinction; the rules of evidence prescribing the qualifications of witnesses are intended to operate against evidence educed from untrustworthy sources, and are as clearly rules of evidence as the rule prohibiting the admission of hearsay or unsworn testimony.

1 Greenl. Ev. §327. (Redf. ed.)

Any law is an *ex post facto* law, within the meaning of the Constitution, passed after the commission of a crime charged against a defendant, which, in relation to the offense or its consequences, alters the situation of the party to his disadvantage.

Kring vs. State, cited ante.

FOURTH.

The fourth error complained of by plaintiff in error is that the court erred in permitting witness Carr, over defendant's objection, to detail a statement made to him by the defendant. (See Transcript p. 22, paragraph IV.) A confession is a "voluntary admission," one uninfluenced by the hope of reward or fear of punishment.

1 Bouvier Law Dict., Title Confession.

To entitle defendant's alleged confession to be admitted in evidence it should have been affirmatively shown that it was voluntary.

1 Greenl. on Ev. §219. (Redf. ed.)

2 Leading Crim. Cases, 487 Regina vs. Warringham.

Not only was this not done in the case at bar but on the contrary, the evidence shows that the defendant made the statement to Carr under such circumstances as to raise a reasonable presumption that he was actuated by fear.

FIFTH.

The fifth error complained of by plaintiff in error is that the court instructed the jury in regard to a matter of fact, to wit: in the last instruction given by the court on its own motion (see Transcript of Record, p. 11) the court says "That an atrocious and dastardly murder has been committed by some person is apparent."

The instruction so given is a matter of record, and a subject of appeal under the provisions of the Utah code of Criminal Procedure §§ 315 and 339, and its correctness is clearly open to consideration in this court without its being either excepted to or embodied in a bill of exceptions.

104 U. S. 633 Hopt vs. People.

Two main issues were raised in the case at bar by the plea of not guilty, to prove both of which issues the burden was on the prosecution.

1st. That a crime had been committed.

2d. That the defendant committed it.

Code Crim. Proc. § 204.

Wharton on Criminal Law, §§ 745, 746.

49 N. Y. 143 People vs. Bennett.

30 Vt. 377 State vs. Davidson.

28 Iowa 553 State vs. Keeler.

61 Cal. 137 People vs. Aleck.

Both of these issues had to be passed on by the jury.

49 N. Y. 147 People vs. Bennett.

60 Cal. 85 People vs. Ah Lee.

It was also the province of the jury to determine the degree of the crime.

Code Crim. Proc. § 300.

The instruction of the Court was in effect to tell the jury that

there was conclusive proof that a crime had been committed, that that crime was so atrocious in its character as to be murder in the first degree, and that their only duty in the premises was to find out who committed the crime.

This was in clear contravention of our statute law and was error.

Code Crim. Proc. § 257 subdivision 7.
39 Ill. 26 Bond vs. People.
18 Ill. 264 Hopkinson vs. People.
53 Cal. 612 People vs. Buster.
54 Cal. 63 People vs. Carrillo.
66 Mo. 114 Peck vs. Ritchey.
75 N. C. 275 State vs. Dixon.
29 Tex. 499 Ross vs. State.
18 Mo. 331 State vs. Dillihunty.
49 Mich. 82 People vs. Lyons.

Where a judge has intimated to the jury an opinion on a matter of fact in issue the error cannot be cured by instructing them in distinct terms that they are the sole judges of the facts of the case.

7 Nev. 152 State vs. Ah Tong.
Id. 383 State vs. Harkin.
49 Mich. 82 ante.

THOMAS MARSHALL,
LEE J. SHARP,
HALL & MARSHALL,
Attys. for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

FREDERICK HOPT, PLAINTIFF in error, *vs.* THE PEOPLE OF THE TERRITORY of Utah.	No. 1013.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

FREDERICK HOPT, PLAINTIFF in error,
vs.
THE PEOPLE OF THE TERRITORY of Utah.
} No. 1043.

Deft. in Error.

BRIEF FOR THE ~~UNITED STATES.~~

This case, which is an indictment for murder, is here for the second time. (*Vide* 104, U. S., p. 631.)

The judgment condemning the plaintiff in error to death is assailed on several grounds, which we will consider in the order in which they are given in the brief of the plaintiff in error.

FIRST.

The first ground is that "the court erred in permitting a portion of said trial to be conducted in the absence of defendant, and in the absence of any one representing the defendant."

This assignment of error refers to the fact that whenever triers were appointed to try and determine the validity of a challenge of a proposed juror the inquiry as to such validity was conducted out of the presence of the court and the accused.

By the Code of Criminal Procedure of Utah, section 218, it is provided that "If the indictment is for a felony the defendant *must* be personally present at the trial." * * * (Laws of Utah, 1878, p 106.)

The contention is that the inquisitions of the triers out of the presence of the accused were in violation of this provision of law.

It is not pretended that the accused asked the court to permit him to be present at the proceedings before the triers, and that his motion was denied, but the extreme ground is taken that what went forward before the triers was a part of the trial of the accused in the sense of the statute above quoted, and therefore that he had no power to waive his right to be present before the triers.

The record recites that—

> "No objection was made to said triers retiring from the court-room, or exception taken thereto during the progress of said trial. No witnesses or testimony were produced by either the prosecution or defense before said triers at the trial of either of said challenges. The proposed juror was examined by the triers, and no other evidence offered or received." (R., p. 33.)

The question presented, therefore, is not whether the accused had a right to insist on being present before the triers, but whether there was anything in the laws of Utah that disabled him from waiving that right.

We submit that the word "trial" in the territorial act

refers to *trial by jury*. The language of the statute is to be taken in its ordinary acceptation, by which the trial of a case is understood to begin after the jury is sworn. Hence Lord Hale says, "after the prisoner hath pleaded and put himself upon the country the next thing in order of proceeding is *the trial* of the offender." (Plac. Cor. 259, ch. 34.) Sir Michael Foster speaks of the privileges the prisoner is entitled to and what is incumbent on him "*previous to trial* and what *during the trial*." (Crown Law, 227.)

In United States *vs.* Curtis (4 Mason, 232) Mr. Justice Story was called on to determine the meaning of section 28 of the act of Congress of 1790, which requires that in capital cases a copy of the indictment, &c., shall be delivered to the prisoner two entire days *before the trial*, and he held, on great consideration, that the word "trial" in the act meant trying the cause *by the jury*, and not the arraignment and pleading preparatory to such trial by the jury. The learned judge says in his opinion: "In short, so far as authorities or reasoning or forms go, there can be no legal doubt that by the term "*trial*" is generally intended, in the law, *the actual trial of the prisoner by the jury*. The Constitution of the United States, too, in the sixth amendment, which provides that the accused shall enjoy the right to a speedy and public trial by jury, manifestly uses the term in the same sense; and, indeed, it pervades the general structure of our laws. (*Ib.*, pp. 237, 238.)

It would seem very clear, then, that the provision of the law of Utah in question has no application, and consequently that whatever rights the accused had in the

premises he has waived them, for that an accused may waive rights in criminal as well as civil cases is too clear for argument. (1 Bishop, Cr. Pro., § 1004, and cases cited: People *vs.* Henderson, 28 Cal., 475, '76; People *vs.* Bonney, 19 Cal., 445.)

SECOND.

This assignment of error is based on the fact that the surgeon, who made the autopsy of the body of the deceased was permitted in giving his testimony, to state the name of the person who pointed out to him the body.

It would be remarkable indeed if the prosecution could not have elicited from the witness the name of the person who pointed out the body to him. The prosecution was entitled to know that fact under all the sanctions that give weight to testimony, that the person referred to might, if necessary, be called as a witness. According to the contention of the plaintiff in error this could not be done legally.

If it had been the purpose to identify the body by hearsay the witness would have been asked what was said by the person who pointed it out to him. It is impossible to think that the jury could have understood the fact stated as evidence of identity.

It would have been proper for the witness himself to state of his own motion and by way of inducement to his testimony, as he probably did, that some one pointed out the body to him. Might he not go a step further and state who that person was?

A witness may always state how he came into a given

relation with a person or thing. Without such introductory matter testimony would often appear truncated and imperfect.

THIRD.

The third assignment of error is that the witness, Jack Emerson, a convicted felon, was allowed to testify against the plaintiff in error.

The criminal procedure act of 1878, § 420, prescribes that—

> "The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this act."

At the time this provision became law the civil practice act contained this section (§ 1603):

> "Persons against whom judgment has been rendered upon a conviction for felony, unless pardoned by the governor or such judgment has been reversed on appeal, shall not be witnesses."

This continued to be law until the 9th March, 1882, when it was repealed. It, moreover, was the law at the time the homicide was committed and the indictment found.

It is contended that (1) the repeal of § 1603 was not intended to affect the criminal practice act, and (2) that if so intended the repeal was inoperative, being an *ex post facto* law.

That the repeal was intended to apply to the criminal practice act would seem very clear. The law is explicit that the rules governing the competency of witnesses in

civil actions shall, unless otherwise provided, be the same in "criminal actions." In other words, it was the intention that the rules in both kinds of actions in respect of the competency of witnesses should be *kept uniform* and that what was the law in civil actions should always be the law in criminal. To restrict the operation of § 420 of the criminal procedure act to such rules g verning the competency of witnesses as *then* existed in civil actions would be to defeat the plain intent of the legislature.

Was, then, the repealing act an *ex post facto* law?

Undoubtedly it removed the disability to testify from persons convicted of felony, but did it change the degree or measure of proof necessary to produce conviction?

In Kring *v.* Missouri (107 U. S., p. 221), and in United States *v.* Hughes (8 Benedict, p. 29) there were attempts to authorize conviction for offenses on *less* evidence than was required by the law as it existed at the time the offense was, in the one case, committed and the cause of action for the penalty, in the other, accrued. But here there is no such attempt. The rule of law remains unimpaired that the accused cannot be convicted except upon evidence sufficient to overcome every reasonable doubt of guilt. As formerly, so now, the evidence must have that amount of probative force, or there can be no conviction. And so long as the requirement that the evidence to justify conviction must have a given probative force continues, how can an accused party complain of legislation in the article of evidence?

If the argument urged for the plaintiff in error is valid it follows that a law authorizing proof by parol instead of writing might be an *ex post facto* law because authorizing

evidence of a *different kind*. But such cannot be the law, we respectfully submit.

The accused has the right to insist that the *degree* of evidence necessary to produce conviction which was required at the time the imputed offense was committed shall not be lessened, but he has no right to insist that the instruments of evidence shall remain unchanged. Has it ever been agitated, let alone decided, that laws rendering emancipated slaves competent witnesses were *ex post facto* as to all crimes and offenses committed before such laws went into effect? And yet it must have been that such laws were unconstitutional on that ground if the argument on the other side is valid.

FOURTH.

The fourth assignment of error consists in the admission of the witness Carr's testimony as to the confession of the accused without hearing evidence as to whether the officer who had the accused in custody had subjected him to improper influences *before the witness joined them*.

The confession was not made until the witness had overtaken the accused and the officer who had him in charge. The witness testified that so far as he knew the confession was voluntary. There was nothing to show that any improper influence had been brought to bear on the accused.

It was enough to show that the accused was not under the allurement of hope or the dominion of fear at the time the confession was made. This renders the testimony admissible. If the accused had desired to inquire into his previous history, with a view to showing that he had at

some other time or place been plied with inducements or threats, it was open to him to do so. But certainly the prosecution had laid a foundation for the admission of the evidence.

FIFTH.

The fifth assignment of error is that the court, after fully instructing the jury as to their duty in the premises, remarked "that an atrocious and dastardly murder has been committed by some person is apparent."

The question here is not whether in the abstract such an observation from the bench would be ground for reversal, but whether it is such ground when taken in connection with all that was said at the same time by the court.

Now, when we look into the elaborate charge of the court to the jury, we find that the law is expounded and the functions and rights of the jury are explained and set forth in a way entirely satisfactory and perspicuous, leaving no ground to suppose that the jury could have a doubt in respect of those matters.

It is not possible to suppose that the remark of the judge could have produced any effect prejudicial to the accused.

The generalization made by the supreme court of Michigan upon the authorities on this head is:

> "*That an expression of opinion by the judge does not amount to a misdirection, even though it may be quite pointed, if the jury are fully informed and understand that they are not bound to follow it, and that they have the right and duty to decide for themselves.*" (Sheahan *vs.* Barry, 27 Mich., 226, and cases cited by the court.)

This authority is all the more forcible from the fact that the law of Michigan provided, at the time the decision was made—

> "That hereafter, in all civil and criminal cases at law, circuit courts, in charging or instructing jurors, shall charge or instruct them *only* as to the *law* of the case."

It was held under this law that it was no ground for reversal that the judge had told the jury that if he were in their places he would discredit certain witnesses, he having previously charged them that they were to pass upon the credibility of all the witnesses.

It is respectfully submitted that the judgment must be affirmed.

WM. A. MAURY,
Assistant Attorney-General.

NEW RAILROAD & TOWNSHIP MAP OF MISSOURI

Showing Latest Government Surveys.

PUBLISHED BY

GEO. F. CRAM,

262-264 Wabash Ave. CHICAGO.

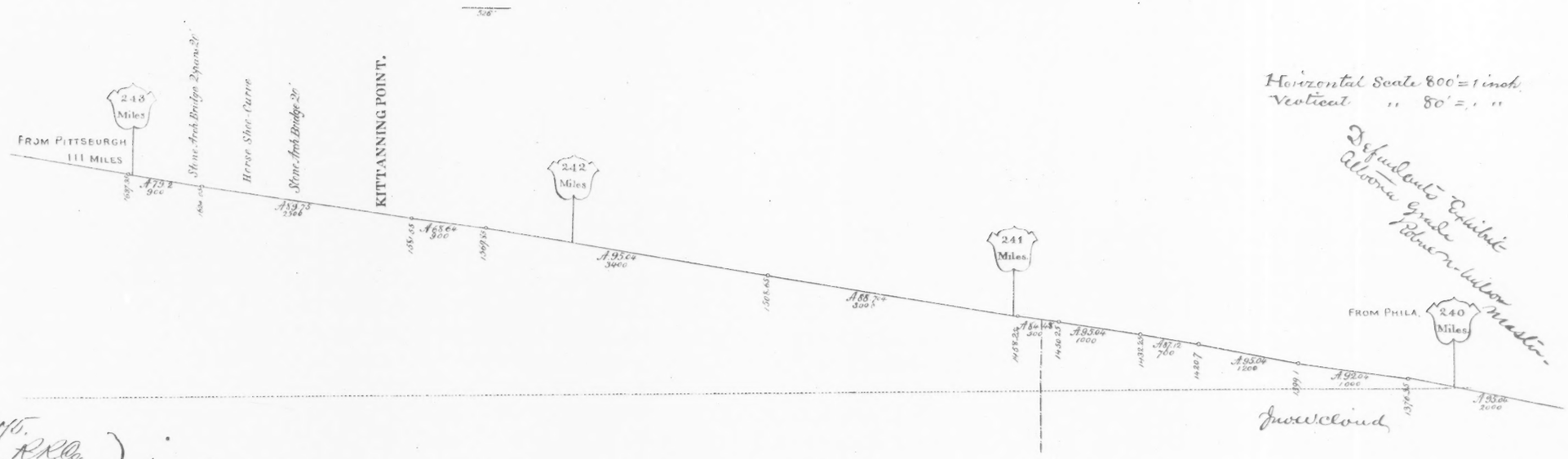
Copyright Secured.

Scale of Statute Miles.

EXPLANATION

County Seats — Towns — Rail Roads — Proposed R.R.

The South-Eastern Extension of Missouri



Horizontal Scale 800' = 1 inch
Vertical " 80' = 1 "

Defendants' Exhibit
Altoona Grade
Pittsburgh-Lubon Maxim-

No. 2775.
Penna. R.R. Co.
v.
Locomotive Engine
Safety Truck Co.
} Page 420.

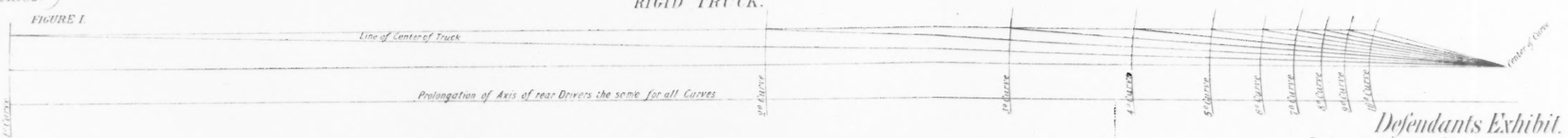
No. 975
Penna R.R. Co.
Locomotive Engine
Safety Truck Co
Scale-500 ft to 1 inch

No. 275
Penna R.R. Co.
vs
Locomotive Engine
Safety Truck Co.

page No 6.

RIGID TRUCK.

FIGURE I.



Defendants Exhibit.
Prolongation of the Axis of Driving Wheels at Center of Curves.
Barton Miller
Clerk

SWING TRUCK.

FIGURE II.

R. H. Dudley.

Perpendicular Exhibit.
Lines of Curves described by particles
in flanges of Wheels in Motion
Rose & Pelham
Patentees

Section of Driving Wheel
Full Size

Lines showing Path of Curves described by Particles in Flanges of Tires when the Wheel is in Motion

Tire

Flange

Rail

Rail Section

Rail Base

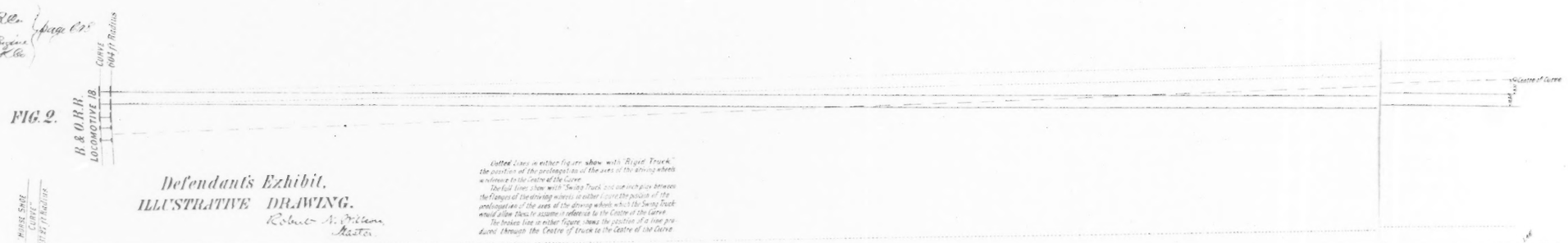
Sleepers

Ballast

Subsoil

No. 275
Grand R.R.Co.
vs.
Canadian Pacific
Rly. Co. et al.
(page 07)

FIG. 2.



Defendant's Exhibit.
ILLUSTRATIVE DRAWING.
Robert N. Gilkam
Master.

Dotted Lines in either figure show with "Rigid Truck" the position of the prolongation of the axes of the driving wheels in reference to the centre of the Curve.
The Full lines show with Swing Truck and one inch play between the flanges of the driving wheels in either figure the position of the prolongation of the axes of the driving wheels which the Swing Truck would allow them to assume in reference to the Centre of the Curve.
The broken line in either figure shows the position of a line produced through the Centre of truck to the Centre of the Curve.

FIG. 1.